Supreme Court, U.S.
FILED

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

AUTEK SYSTEMS CORPORATION

Petitioner

v.

THE UNITED STATES

On Petition for Writ of Certiorari
To The Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the admitted bribe taking by the federal contracting officer assigned to Petitioner's contract, as a matter of law, prevents that federal agency from terminating Petitioner's contract for cause, when Petitioner was an innocent party.

2.a. Whether the Court of Appeals for the Federal Circuit failed to apply this Court's controlling precedent in United States v. Acme Process Equipment Co., 385 U.S. 138, 87 S. Ct. 350, 17 L.Ed.2d 249 (1966) and United States v. Mississippi Valley Generating Co., 364 U.S. 520, 81 S. Ct. 294, 5 L.Ed.2d 268 (1961).

2.b. Whether Petitioner correctly argued to the Court below that these two Supreme Court decisions require, on a public policy basis, that once a taint by fraud of the government's (or the contractor's) representative's actions is established in connection with the award or administration of a federal government contract, that contract may not be enforced to the detriment of the other party. (The Court of Appeals for the Federal Circuit did not discuss either Acme or Mississippi Valley in rendering its decision.)

3. Whether an innocent contract party such as Petitioner must show unequivocal causation and precise proof of how admitted fraudulent acts by a federal contracting officer impeded or prevented its performance of a federal contract, before Acme or Mississippi Valley control the outcome.

LIST OF PARTIES AND CORPORATE STATUS PER RULE 14 (b).

The caption to this case states the only two parties to this litigation, Autek Systems Corporation and the United States.

Pursuant to Rule 29.6, Autek Systems Corporation has no parent or subsidiary corporations to be listed.

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United States Court of Appeals for the Federal Circuit - JUDGMENT - March 22, 1996.

United States Court of Appeals for the Federal Circuit - ORDER - April 16, 1996 (denying Appellee's petition for rehearing).

United States Court of Appeals for the Federal Circuit - ORDER - April 30, 1996 (denying Appellant's petition for rehearing).

TABLE OF CITED AUTHORITIES

United States v. Acme Process Equipment Co., 385 U.S. 138, 87 S.Ct. 350, 17 L.Ed.2d 249 (1966)..... (i)

United States v. Mississippi Valley Generating Co., 364 U.S. 520, 81 S.Ct. 294, 5 L.Ed.2d 268 (1961) ..... (i)

Godley v. United States, 5 F.3d 1473 (Fed. Cir. 1993)..... (i)

CITATIONS OF OPINIONS AND ORDERS ENTERED IN THIS CASE

1. Autek Systems Corporation v. United States, No. 90-710C. Ct. Fed. Cl. (1994)(Copy reproduced in Appendix)

2. Autek Systems Corporation v. United States, No. 95-5013. 82 F.3d 434 (Fed. Cir. 1996) Unpublished per Court order. (Copy reproduced in Appendix)

STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT

1. Judgment entered in the United States Court of Appeals for the Federal Circuit - affirming in part, vacating in part and remanding in part Petitioner's appeal from an unfavorable judgment of the United States Court of Federal Claims - 3/22/96.

2. Petition of Appellee for rehearing in the United States Court of Appeals for the Federal Circuit, denied - 4/16/96

3. Petition of Appellant for rehearing in the United States Court of Appeals for the Federal Circuit, denied - 4/30/96

4. The statutory provision conferring Supreme Court jurisdiction to review on a writ of certiorari the judgment of a United States Court of Appeals is U.S.C. § 1254.

STATEMENT OF THE CASE

1. Introduction.

This case involves the legal application of the Court's precedents in Acme Process Equipment and Mississippi Valley Generating, supra.

This case arises from the final decision of a Marine Corps contracting officer on January 24, 1990, terminating for alleged default Autek System Corporation's federal government contract to deliver automated test equipment, known as Marine Corps Automated Test Equipment System (MCATES). On April 21, 1989, the originally assigned federal contracting officer, Mr. Jack Sherman, was convicted of taking bribes. He took these bribes in exchange for taking away a portion of the MCATES contract from the Petitioner and awarding it to another contractor who paid the bribes. He was sent to federal prison for this offense. (Plt. Trial Ex. 458, pp. 78-79; A112-113) (All citations are to the official record of the Courts below in the form required by those Courts.)

This case is likely one of first impression in the federal courts because it involves an innocent third-party, Autek, who has been terminated for default because of bribe taking activity of a government contracting officer caught up in the well-known government wide investigation to root out fraud, waste and abuse, popularly called "Operation Ill Wind." (Ct. Fed. Cl. Decision p.2 last para.; A3)

In this litigation, Autek seeks to be paid for the costs it expended before its contract was terminated for default; the Marine Corps also seeks as part of this proceeding a refund of $6.5 million (all prior payments made to Autek).

The trial court, the United States Court of Federal Claims denied Petitioner's request for relief in virtually all respects and allowed the full $6.5 million counter claim. Suit was originally brought in that Court as permitted by the Contract Disputes Act of 1978 (41 U.S.C. § 601-603).

Appeal was taken to the United States Court of Appeals for the Federal Circuit, pursuant to 28 U.S.C. § 1295 (a)(3). The Court of Appeals, by its final judgment, reversed in part and eliminated a part of the Marine Corps affirmative judgment of approximately $6.5 million against Petitioner levied by the lower Court. The Court of Appeals also granted Petitioner no affirmative relief for the costs it had expended in performing the contract. This petition for certiorari seeks review of the Court of Appeals' final judgment.

Autek is a small business (Plt. Trial Ex. 477, p. 8-3, para.11-9; A331) with limited financial resources. (Plt. Trial Ex. 234; A321-327) The forfeiture of this contract caused by the Marine Corps' default termination action, and the Court of Appeals decision upholding it in part, in effect directs a bankruptcy of this corporation.

2. Contracting Officer Sherman's Bribe Taking

Petitioner summarizes in this section, the explicit and unsavory details from the trial record which shows the bribe taking actions that Contracting Officer Sherman took in the middle of Autek's contract performance. His actions were appalling, and directly affected Autek's contract performance. And the record shows his corruptions had gone on for at least five years before the Autek contract was terminated.

As the record from the trial below shows, this contracting officer illegally broke Autek's contract into two parts, hardware and software, in exchange for bribes he received from the new software contractor (Whittaker), to whom he then awarded the software portion of the work, which had been an integral part of Autek's contract (Plt. Trial Ex. 458, pp.13-14; A47-48) (Plt. Trial Ex. 458, p. 171 line 15 - p. 175 line 19; A205-209)

Sherman's acts caused the fragmentation of Autek's contract from an integrated system of both hardware and software, into a contract for the hardware portion only. This left the software, which was essential to the performance of the hardware, to be independently accomplished by Whittaker, which had paid the bribes to Sherman, and no one responsible for integration of the hardware and software.

3. Specific Proof of Bribe Taking, Fraud and Corruption in the Trial Record.

This is not a situation in which there is any doubt that the illegal actions of Contracting Officer Sherman took place and that the action involved the fragmentation of Autek's contract; they are explicitly detailed in the exhibits at trial, coming from Federal Bureau of Investigations surveillance documentation. This record shows the cash bribes paid to Sherman to remove the critical software portion of Autek's contract, and illegally award it to another contractor - Whittaker - who had paid the cash bribes.

The record of trial exhibits shows that since at least 1982, contracting officer Jack Sherman had engaged in a pattern of bribery and corruption with Lee Telecommunications Co., which became a division of the Whittaker Corporation. He was taking these bribes from Whittaker before and then throughout the entire time that the Autek contract was being performed, and up to the point of his arrest. (Plt. Trial Ex. 458, pp.3-6, 13-15, 18-19, 22-34, 42-43, 49-70, 121, 128, 130-132, 136-137, 139-142, 171-175, and 178; A37-40, 47-49, 52-53, 56-60, 76-77, 83-104, 155, 162, 164-166, 170-171, 173-176, 205-209, 212)

In mid-1987, performance problems developed on the Autek contract, between Autek and its subcontractor Northrop. These problems were being mutually resolved by both parties in the ordinary contractual manner of give-and-take negotiation. Contracting Officer Sherman

saw this as an opportunity to obtain additional cash bribes, intervened directly with Northrop and then, determined to break the Autek contract apart, placed a portion of it with the Whittaker Corporation from which he had been receiving bribes for five years, so that he could get another 5% in cash of this new contract value in additional cash bribes. (Plt. Trial Ex. 458, p.6; A40)

This fragmentation of Autek's contract by Contracting Officer Sherman was contrary to what the Marine Corps' own technical personnel and officials recommended take place. (Plt. Trial Ex. 080, pp. 2-3; A351-352) (Plt. Trial Ex. 082, p. 1; A378) (Plt. Trial Ex. 086, p. 1; A397) (Tr. p. 707 and pp. 713-714; A733-734; Testimony of Jensen). These documents in the record show, from the fall of 1987 through February of 1988, the Marine Corps' technical personnel repeatedly recommending that the software work be done by Autek, or that it be done by Northrop and returned to Autek for appropriate and necessary integration with Autek's hardware.

The Marine Corps technical office's recommendations, if they had been followed, would have avoided the problems leading to the default of Autek. Autek would have remained the integrator of both hardware and software as originally contemplated by its contract before Sherman's bribe taking. The contracting officer's receipt of bribes and his decision to place the software work with Whittaker in fact aborted and overruled these technical office recommendations.

The fact that Sherman placed the Whittaker contract on a basis where Whittaker received all of its costs regardless of performance (Plt. Trial Ex. 099, p.3, para. 8; A437) while continuing the Autek contract on a fixed price basis (Plt. Trial Ex. 477, p. 9-1; A332) simply made matters worse. As the company paying the bribes, Whittaker had every reason to take its time and to find every conceivable problem it could in Autek's hardware because it was being paid all of its costs plus profit for doing so. As a fixed price contractor, Autek needed to complete the work as promptly as possible and on a lowest cost basis as every fixed price contractor must.

This is not a situation in which there are vague allegations of bribery, and vague connections to the contracts involved. In this case, the criminal investigation and court records show intimate and explicit connections between government Contracting Officer Sherman's bribe taking and the exact, specific contracts involved in this case i.e., the Autek contract and the fraudulent addition to the Whittaker contract. The trial record in the court below shows an overwhelming pattern of corruption on Sherman's part, specifically related to Autek's contract. (Plt. Trial Ex. 458, pp. 3-6, 13-15, 18-19, 22-34, 42-43, 49-70, 121, 128, 130-132, 136-137, 139-142, 171-175, and 178; A37-40, 47-49, 52-53, 56-60, 76-77, 83-104, 155, 162, 164-166, 170-171, 173-176, 205-209, 212)

There is no doubt as to the causation of this bribe taking and its impact on Autek's contract: it is at the root of the default termination.

4. Marine Corps Contracting Officer Jack A. Sherman's History of Bribery and Corruption.

The following information from the trial record concerning Jack Sherman is recorded in an FBI report:

* * *

> Through consensually recorded conversation it was learned SHERMAN was receiving bribe payments from LEE TELECOMMUNICATIONS/WHITTAKER (LTC) for information and influence he could provide on contracts of interest to LTC.
>
> * * *
>
> On June 14, 1988 SHERMAN was interviewed and admitted to receiving $10,000 total from LTC through MARLOWE/MULDOON for information on the ATACC support contract.
>
> [Report of Federal Bureau of Investigation, Special Agent Michele S. Formico, Plt. Trial Ex. 458, pp. 3-5; A37-39]

The FBI materials and criminal information establish Sherman's bribery activities in direct connection with the fragmentation of Autek's contract; they also establish that Sherman was actively involved in undertaking illegal activities in return for bribes from Lee Telecommunications. Sherman was taking those actions on the Marine Corps' ATACC support contract, referenced above, which was the same contract to which Modifica-

tion POOO15 was ultimately issued, adding what had previously been the heart of Autek's MCATES contract, the software work, to the existing totally unrelated ATACC contract held by Whittaker. (Plt. Trial Ex. 458, pp. 3-5; A37-39)

Sherman capitalized on some problems that had developed between Northrop, Autek's subcontractor, and Autek on the Autek prime contract. In spite of the fact that these problems were being mutually resolved by both parties in the ordinary contractual manner, he saw this as an opportunity to obtain additional bribes and intervened directly with the subcontractor, Northrop.

The following is recorded in FBI reports:

* * *

> SHERMAN told LAMBERTH he wanted five percent of the estimated MCATES program cost of $700,000-$900,000 [the software portion of the Autek contract], and suggested using ILLEMAN as the conduit. LAMBERTH agreed to the scheme and SHERMAN met with ILLEMAN the following day at ILLEMAN's home in San Diego, California.
>
> At the ILLEMAN/SHERMAN meeting, SHERMAN explained to ILLEMAN they would split five percent of the estimated contract price, which totaled approximately $45,000. ILLEMAN agreed to the scheme and SHERMAN gave ILLEMAN the names of LAMBERTH and INGRAM as WHITTAKER contact points and told ILLEMAN to contact LAMBERTH to discuss the

details of the deal. [Plt. Trial Ex. 458, p. 6; A40]

And the FBI reports also show:

> AUTECK, [sic] according to SHERMAN, had two contracts with HQMC, a test head contract and a driver testing for military equipment contract and the Marine Corps was not satisfied with AUTECK's [sic] performance on the contracts. SHERMAN suggested the remaining software section of one of the contracts worth approximately $700,000.00 be taken from AUTECK [sic] and a separate contract order be placed with another vendor. SHERMAN recommended LTC/WHITTAKER. [Plt. Trial Ex. 458, p. 12; A46]

* * *

The criminal information filed by the United States against Whittaker/LTC and the guilty plea to it, establish that Whittaker admitted to bribery of Contracting Officer Jack Sherman, in return for receiving a part of the Autek contract, the transfer of the software effort from Autek to Whittaker:

> 15. The single largest modification increasing the value of the ATACC support contract was completed in or about February 1988. Prior to that time, in or about August 1986, the Marine Corps had awarded the Marine Corps Automated Test Equipment System (hereinafter MCATES) contract to another company. [This was Autek - see contract document dated August 22, 1986, Plt.

> Trial Ex. 477, p.1; A330] The contract had required computer software development and hardware production. When the company had difficulty with the software development, Jack Sherman recommended and received approval to have that aspect of the work transferred to LTC as part of the ATACC support contract. This transfer increased the value of the contract by approximately $1.6 million. [Plt. Trial Ex. 458, p. 18-19; A52-53]
>
> * * *

Given this continuing pattern of bribery and corruption, it is not credible that Sherman, who Whittaker admitted was "to look after WCCS' interests on the ATACC support contract" (Plt. Trial Ex. 458, p. 34, para. 52; A68), would not have been looking for ways to add additional work to that contract during 1987. Indeed, the above cited trial exhibits strongly support that Sherman was doing exactly that. These criminal court documents have support in that the FBI records show that telephone recordings of Sherman's and his co-conspirators' activities were taking place as early as 1986. (Plt. Trial Ex. 458, p. 7; A41)

In the Statement of Facts attached to the Whittaker Plea Agreement, Sherman's activities on behalf of Whittaker are further confirmed to be illegal, corrupt and continuing in nature during the period of his responsibility for the Autek contract (1986-88). (Plt. Trial Ex. 458, p. 49; A83)

In the FBI's interviews with Sherman, he admitted to these same allegations to which Whittaker pleaded guilty. (Plt. Trial Ex. 458, pp. 5-15; A39-49) In a formal Plea Agreement responding to Criminal Information, Sherman admitted to the corruption and bribery of 1986 through 1987.(Plt. Trial Ex. 458, pp. 53-69; A87-103)

These documents referenced above, and the Statement of Facts attached to them (Plt. Trial Ex. 458, p. 70; A104), show that from September 1986 forward, Sherman's bribery activities were under surveillance by "tape recording, video taping and photographing ...his actions." Despite this, however, Mr. Sherman was permitted by government officials to continue to conduct his ordinary government affairs on contracts, including the deliberate fragmentation of the MCATES contract being performed by Autek:

> 15. On or about April 4, 1986, Sherman accepted responsibility on behalf of the Marine Corps for administering the ATACC support contract.
>
> 16. Between in or about March 1986, and in or about August 1986, Lamberth paid Sherman a sum of United States currency to continue to assist LTC with Marine Corps contracts.
>
> 17. On or about August 19, 1986, Sherman authorized his subordinate to sign the TADIL-A upgrade contract on behalf of the

Marine Corps which had a value to LTC of approximately $616,560.

18. On or about October 1, 1986, Lamberth and Sherman discussed working out a new arrangement to provide money to Sherman in return for his assistance to LTC. [Plt. Trial Ex. 458, p.27; A61]

* * *

26. On or About February 24, 1987, Marlowe and Sherman met, at which time:

a. They stated that LTC's $800 monthly payments to Sherman were small compared to the thousands of dollars LTC had previously paid Sherman through Muldoon; and,

b. Sherman said that he would ask for more money when Lamberth asked Sherman to add another year onto the ATACC support contract. [Plt. Trial Ex. 458, p. 29; A63]

* * *

29. On or about November 13, December 2, and December 17, 1986, and January 7, January 20, February 16, March 6, March 24, April 20, May 8, May 21, June 10 and June 19, 1987, Marlowe paid Sherman sums of United States currency, in part to look after LTC's interests on the ATACC support contract. [Plt. Trial Ex. 458, p. 30; A64]

* * *

52. On or about February 4, 1988, Muldoon paid Sherman a sum of United States currency, in part to look after WCCS' interests on the ATACC support contract.

53. On or about February 9, 1988, Lamberth met with Sherman and they agreed that: (1) Sherman would make sure that the money for the software portion of MCATES [Autek's contract] was transferred to WCCS as part of the ATACC support contract, (2) Lamberth would cause WCCS to pay Sherman five percent of the contract modification amount, and (3) they would try to have the payments run through Donald L. Illeman. [Plt. Trial Ex. 458, p.34; A68]

Donald Illeman was charged with bribing Jack Sherman directly by passing cash money to him in return for services in connection with the transfer of the software to Whittaker from Autek's contract. (Plt. Trial Ex. 458, p. 103; A137 and the Statement of Facts attached to plea agreement starting at Plt. Trial Ex. 458, p. 113; A147). In that plea agreement and its attachment, Illeman admits that he passed cash money to Sherman in the form of bribes which he had received from Whittaker to respond to Sherman's demands that he be paid for taking the computer "software" from Autek's contract and giving it to Whittaker:

From September 1986 through June 1987, Sherman agreed to continue to expedite paperwork for LTC on the TADIL-A upgrade and ATACC support contract. Sherman also

added two more option years onto the ATACC support contract. Sherman received approval for this action from superiors, although he failed to obtain approval from the Marine Corps Sole Source Board which was required by Marine Corps procedures. Without approval from the Board, Sherman should have opened up the contract to competition. In addition, Sherman authorized modifications to the ATACC support contract increasing its value to LTC by approximately $700,000.

* * *

Later in February 1988, Sherman went to California. Sherman was responsible for the administration of the Marine Corps Automated Test Equipment Systems (MCATES) contract. The work under the contract was being done in California and the company doing the software portion was having difficulty. Sherman came up with the idea of having that portion of the MCATES contract transferred to LTC and added to the ATACC support contract.

* * *

On February 22, 1988, Sherman authorized a modification to the ATACC support contract adding over $1.6 million to its value.[Plt.Trial Ex. 458, p.51; A85] [Emphasis added]

* * *

5. Causation of Sherman's Bribe Taking on Autek's Contract Was Proven

Introduction. The only position that the Marine Corps has taken on the entire issue of Contracting Officer Sherman's bribe taking may be summarized as follows: "Yes, there was fraud in placing a contract with Whittaker, but that has nothing to do with Autek or its performance on Autek's remaining contract." The documents and testimony at trial show that this Marine Corps' position is wrong.

Mr.Jensen's Testimony and Contemporaneous Memorandum. Mr. Jensen, the Marine Corp' technical manager for this contract at Albany, Georgia, testified and wrote candidly and unequivocally that he was dissatisfied with the work he was forced to do in January of 1988 in drafting the new specification for the Whittaker contract and the new specification for Autek, as a result of contracting officer Sherman's direction to fragment the Autek contract and give the software portion to Whittaker. This was not something that happened in a vacuum, as Mr. Jensen candidly explained; it was the explicit direction of Mr. Sherman to rip the Autek contract in half.

Mr. Jensen asked Mr. Sherman for additional time to develop more detailed specifications and time to edit for errors/omissions, but he was "given sympathy" and nothing more. He had to do it, and he was dissatisfied with the results of his own efforts. (Tr. pp. 712-715; A734):

A. [Mr. Jensen]....normally you take several months and you do research and you analyze it and you review it. We were asked to do that literally in a few days versus taking the time that it takes to develop a proper specification. (Tr. p. 709 lines 4-7; A733)(Emphasis added)

* * *

...you had to do the revised PD [purchase description] for Autek's hardware and the new PD for software in a period of a few days. (Tr. p. 709 lines 18-20; A733)(Emphasis added)

* * *

Q. [Autek Counsel]..... Do you recall when Mr. Sherman called you?

A. I know I talked to him on the phone more than once. I don't know how many times. About this software separation and all that stuff. (Tr. p.712 lines 12-16; A734)(Emphasis added)

* * *

Q. All right. Mr.Jensen, did you express any concern about the process that was taking place to those gentlemen?

A. Yes.

* * *

A. Well, basically from a technical perspective. ... it was a major change ... That we had approached this as a whole basket of eggs type deal and now we're trying to take part of the egg out of the basket and it's that change in midstream and then to do it that quickly is - I feel is always a very difficult thing and it was difficult. I mean, from a technical side to try and take all this and break it up and think it through and do it that quickly.

Q. All right. And did you express those concern to the contracts people at MCRDAC?

A. Yes.

Q. All right. And, did you get an answer back for your concerns? Or did you get a direction to do it?

A. Basically, you say an answer, I say I got sympathy. (Tr.p. 712 line 23 - p. 713 line 18; A734)

* * *

A. I believe we were under the pressure to get it to Whittaker real fast. [Tr. p. 722; A736; Testimony of Jensen] [Emphasis added]

In his contemporaneous memorandum of August 18, 1989, one year after the fragmentation Sherman directed, and five

months before the default termination of Autek, he recorded his views as to the disastrous results occurring due to Mr. Sherman's direction to fragment the Autek contract and take away the software portion from it:

* * *

> 4. Determination as to which problems are attributable to inadequate specifications is difficult to assess, and at best only a subjective rationale can be provided. The segregation of the system software and the testhead into two separate efforts has resulted in the Government having two marginally defined requirements. When the two were a single entity, the overall performance was the result of a system specification whereby acceptable performance was measured as a function of effective test rate. Due to the restrictive timeframe under which the two specifications were developed from one, [as Sherman directed Mr. Jensen to do Tr. p. 712 lines 12-16; A734] several areas are left in a vague uncertainty of which specification carries the primary responsibility. .... Based on "hindsight", it would have been in the Government's interest to have developed an interface specification to which the two efforts could have achieved a mutual ground. This may still be the ultimate solution to ensure that neither effort again goes astray. [Plt. Trial Ex. 235, p.3, para 4; A337] [Emphasis added]

* * *

Both the Marine Corps' and Autek's experts stated repeatedly at trial and in reports that lack of access to or knowledge of the software (1) made Autek's contract work more difficult, (2) prevented Autek from making software integration implementations to solve the Marine Corps' perceived hardware problems, and (3) generated disputes over whether "software" or "hardware" should have provided access to various functions. This is exactly what caused the default termination of Autek. [Plt. Principal Brief, Court of Appeals for the Federal Circuit, pp. 21-27]

ARGUMENT

1. The Court of Appeal's decision is fundamentally in error because it did not consider the legal standard of United States v. Acme Process Equipment Co., 385 U.S. 138, 87 S.Ct. 350, 17 L. Ed.2d 249 (1966) and United States v. Mississippi Valley Generating Co., 364 U.S. 520, 81 S. Ct. 294, 5 L. Ed.2d 268 (1961), the controlling Supreme Court precedent.

The Supreme Court has issued two leading decisions dealing with government contracts and fraud or illegal actions by contractors and government representatives. Those decisions do not require that a contractor or the government prove exact causative impacts arising from the illegal act, before the contract action involved is found to be void. The Supreme Court, we respectfully suggest, found that to be the case because of its overriding public policy concern that neither a contractor nor the government

should be penalized when a contract's award or administration is tainted by fraud. The fraud by the government contracting officer in Autek's case is admitted and outrageous. The contracting officer took action under Autek's contract in reducing its scope and, accordingly, Autek's ability to perform, for the specific reason of receiving cash bribes. The government concedes that. [Brief for Defendant-Appellee, Court of Appeals for the Federal Circuit, p.3]

Autek submits that under Acme and Mississippi, supra, this should end the inquiry and that punitive actions, such as the default termination here involved, can not be taken against an innocent contractor such as Autek when a contract is tainted by the fraud of the government's Contracting Officer.

The following statements from the court in Acme, supra, show that it is the taint and the damage to public perception of the procurement process with which the Supreme Court was concerned:

> The Anti-Kickback Act not only 'prohibited' such payments, but clearly expressed a policy decidedly hostile to them. They were recognized as devices hurtful to the Government's procurement practices. Extra expenditures to get subcontracts necessarily add to government costs.... (385 U.S. 138 at 143)
>
> * * *
>
> Acme argues, however, that the express provision for recovery of kickbacks is enough to protect the

Government from increased costs attributable to them. But this argument rests on two false assumptions. The first is that kickbacks can easily be detected and recovered. This is hardly the case. Kickbacks being made criminal means that they must be made--if at all--in secrecy. Though they necessarily inflate the price to the Government, this inflation is rarely detectable. (385 U.S. 138 at 144)

* * *

And even if the Government could isolate and recover the inflation attributable to the kickback, it would still be saddled with a subcontractor who, having obtained the job other than on merit, is perhaps entirely unreliable in other ways. This unreliability in turn undermines the security of the prime contractor's performance--a result which the public cannot tolerate, especially where, as here, important defense contracts are involved. (385 U.S. 138 at 144-5)(Emphasis added)

* * *

[I]t is appropriate to say that it is the 'inherent difficulty in detecting corruption which requires that contracts made in violation of ... (the Anti-Kickback Act) be held unenforceable, even though the party seeking enforcement ostensibly appears entirely innocent.' (385 U.S. 138 at 147-8)

These public policy prohibitions articulated by the Supreme Court in Acme, are fully applicable to the illegal cash bribes being paid to Sherman, for which he was convicted and sent to jail. They state no requirement for causation. They are concerned with the taint of illegal actions and its effect upon the federal procurement process.

Likewise, the Supreme Court made similar findings in its earlier decision in Mississippi Valley, supra:

> The obvious purpose of the statute is to insure honesty in the Government's business dealings by preventing federal agents who have interests adverse to those of the Government from advancing their own interests at the expense of the public welfare. [Citation omitted] The moral principle upon which the statute is based has its foundation in the Biblical admonition that no man may serve two masters, Matt. 6:24, a maxim which is especially pertinent if one of the masters happens to be economic self-interest. (5 L.Ed. 2d 268 at 288)
>
> * * *
>
> To this extent, therefore, the statute is more concerned with what might have happened in a given situation than with what actually happened. (5 L.Ed. 2d 268 at 288)
>
> * * *
>
> If the activities of a government agent have as decisive an effect

> upon the outcome of a transaction .... then a refusal to characterize those activities as part of a business transaction merely because they occurred at an early stage of the negotiations is at war with the obvious purpose of the statute. (5 L.Ed. 2d 268 at 291)
>
> * * *
>
> The statute is directed at an evil which endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption. (5 L.Ed. 2d 268 at 295)

These public policy rules make good common sense. Autek was fortunate enough in the development of the record in the court below to be able to include in the record, and its briefs, powerful evidence of the wrongful and unscrupulous actions of the government's contracting officer.

But, it would be the odd case indeed in which a contractor could prove, with mechanical precision, exactly what were the effects of the taint of fraud on that contract. Autek believes the Supreme Court has recognized in its two decisions that this is not required. Once the taint is established (as here in the Autek case) neither party should be permitted to enforce the contract against each other to its detriment. The default

action taken against Autek is improper. The Court should apply its standard remedy when the contract is void..it will be deemed terminated for convenience.

2. The Court of Appeals cites its own precedent in Godley v. United States, 5 F.3d 1473 (Fed.Cir. 1993) for requiring that there be proof of causation flowing from a government contracting officer's admitted fraud. The Court of Appeals held that an illegal act by a government contracting agent alone does not invoke the void ab initio rule and that "some causal link" between the illegality and the contract must be shown. Petitioner does not believe that is the standard in Acme and Mississippi Valley; in any event, Petitioner proved causation.

We respectfully suggest that the Court of Appeal's reliance on Godley, supra, is misplaced. There, the factual issue upon remand was whether Godley, the contractor seeking to enforce the contract, was a wrongdoer who "caused" the taint. If so, then, as a wrongdoer, he would not be entitled to damages for the government's delay in rescinding the illegal contract which Godley also "caused".

In this case, it is undisputed that Autek was a completely innocent victim, not a wrongdoer. It is the government, whose Contracting Officer was the wrongdoer, who is now seeking to enforce the contract's default provision. Thus, there is no factual "causation" issue to be addressed to determine whether the contract is void.

Moreover, even if a causal link to the contract provisions was required, the undisputed facts show that "but for" the corruption and fraud of the Contracting Officer, there would have been no split in the contract between the hardware portion, and the software portion which another corrupt party, Whittaker, performed. The undisputed testimony and contemporaneous records show that Autek's contract was made more difficult by the corrupt government contracting officer's overhasty splitting of these interrelated contract requirements. Moreover, as suggested in Acme, supra, Autek was left to deal with Whittaker, the other "unreliable" and corrupt party, to coordinate these interrelated responsibilities.

The Supreme Court in Acme, supra, recognized that it is difficult to show the precise harm of a tainted contract. It further recognized that any "corrective" action would still retain that taint; thus, the contract was required to be voided. Once the taint was established, as it is here, the only factual issue is whether the party seeking to enforce the contract caused the taint. The government, through its contracting officer, did so. Autek was completely innocent; Autek did not cause the taint.

The most damaging evidence in the record of the causal effects of contracting officer Sherman's fraud on Autek's contract is the statement shortly before the default termination by the Marine Corps technical manager in charge of Autek's contract, Mr. Jensen. In a reflective memo, Mr. Jensen candidly

records the impact on Autek's contract of Mr. Sherman's actions taken to receive bribes:

* * *

> 4. Determination as to which problems are attributable to inadequate specifications is difficult to assess, and at best only a subjective rationale can be provided. The segregation of the system software and the testhead into two separate efforts has resulted in the Government having two marginally defined requirements. When the two were a single entity, the overall performance was the result of a system specification whereby acceptable performance was measured as a function of effective test rate. Due to the restrictive timeframe under which the two specifications were developed from one, [as Sherman directed Mr. Jensen to do Tr. p. 712 lines 12-16; A734] several areas are left in a vague uncertainty of which specification [Autek or Whittaker] carries the primary responsibility. .... Based on "hindsight", it would have been in the Government's interest to have developed an interface specification to which the two efforts could have achieved a mutual ground. this may still be the ultimate solution to ensure that neither effort again goes astray. [Plt. Trial Ex. 235, p.3, para.4; A337] [Emphasis added]

* * *

Thus, Mr. Jensen was explicitly recognizing that Mr. Sherman's fraud in

breaking the contract into two separate parts, leaving Autek only a poorly developed hardware specification and giving the software specifications to Whittaker for bribes, left each of the two new contracts subject to debate as to who was responsible for the specific elements of performance. As the record shows, Autek was thus left to debate with a criminal wrongdoer, Whittaker, who should be legally presumed, under the Acme test above to be "unreliable". Autek's problem as a result of Sherman's and Whittaker's fraud, has not been that the contract was "impossible", but rather that Sherman's and Whittaker's actions brought about Autek's default by making two inconsistent, defective contract requirements when there was once only one contract requirement (before Sherman's fraud). The fraudulent acts of Sherman and Whittaker directly caused these two inconsistent, defective contract requirements. Mr. Jensen says so in the memo quoted above. He was the government's technical manager and in the very best position to know the consequences of Sherman's actions on the specifications and the fragmented contracts.

The trial record is further replete (see Appellant's Principal Brief at the Court of Appeals, pp. 21-27) with both plaintiff's and defendant's experts testifying as to the consequences of Sherman's action of making two poorly written contract specifications out of one to receive bribes, and the disastrous consequences of Sherman's action.

Autek believes it has submitted significant proof of causation. Autek would also respectfully suggest that

criminal actions under government contracts are not spelled out by perpetrators such as Mr. Sherman and Whittaker in records showing exactly what they intended to do and intended to cause.

Autek has shown, by a vast accumulation of data in the trial record below that Sherman took Autek's contract and cut it in two to receive cash bribes. Without any question the consequences, from Autek's performance point of view, were disastrous. Autek is thus being punished for Sherman's illegal actions which resulted directly in unwarranted increased difficulties that led to the default termination.

CONCLUSION:

Autek respectfully requests that the Court grant this petition, and find that the legal standards of Acme and Mississippi, supra, have been satisfied. That would result in a termination for convenience of Autek's contract, not a termination for default with its severe penalties.

Respectfully submitted,

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Dated:
7/11/96

APPENDIX

List of Items Contained in the Appendix:

United States Court of Federal Claims - ORDER - October 14, 1994.

United States Court of Federal Claims - JUDGMENT - October 24, 1994.

United States Court of Appeals for the Federal Circuit - NOTICE OF ENTRY OF JUDGMENT ACCOMPANIED BY OPINION - March 22, 1996.

United States Court of Appeals for the Federal Circuit - JUDGMENT - March 22, 1996.

United States Court of Appeals for the Federal Circuit - ORDER - April 16, 1996 (denying Appellee's petition for rehearing).

United States Court of Appeals for the Federal Circuit - ORDER - April 30, 1996 (denying Appellant's petition for rehearing).

IN THE
UNITED STATES COURT OF FEDERAL CLAIMS

No. 90-710C

(Filed October 14, 1994)

AUTEK SYSTEMS CORPORATION,	
Plaintiff,	FILED
V.	OCT 14 1994
	U.S. COURT
	OF FEDERAL
THE UNITED STATES,	CLAIMS
Defendant	

Order

After holding trial from March 8 to March 17, 1994 in Washington, D.C., and considering the parties' post-trial briefs, the court grants summary judgment to the government, based on the following findings of fact and conclusions of law. See rule 52(a) of the Rules of the United States Court of Federal Claims (RCFC).

Facts

The contract at issue in this case was for the purchase of electronic testheads, as an integral part of the Marine Corps Automated Test Equipment System Hybrid Test Station. Stip. 2. \1 A testhead is

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\1 "Stip." refers to the joint stipulation of facts. "PX" refers to plaintiff's exhibits; "DX" refers to defendant's exhibits. "Tr." refers to the trial transcript.

a microprocessor-based device that subjects an electronic component (the "unit under test," or UUT) to a rapid series of electrical stimulus patterns, then reads the component's response and communicates it to another computer (the controller), which determines whether the UUT is functioning properly by comparing the actual response to the expected response. Tr. 1062-63 (Jensen); see DX 8 at 1.

The contract, which was expected to be a low-risk acquisition relying largely on off-the-shelf components, PX 3 at 10, was awarded after two requests for proposals. The United States Marine Corps (USMC or Corps) rejected plaintiff Autek Systems Corporation's (Autek's) first proposal to serve as the prime contractor. Because no price agreement could be reached with the company making the only technically acceptable proposal, the Corps issued a second request. Tr. 1049-50 (Jensen); PX 5 at 1-2. Autek teamed with Northrop Corporation to prepare and submit a technical proposal, under which Northrop would serve as the prime contractor and Autek as the subcontractor. Tr. 278 (Lane); Tr. 1051 (Jensen); see PX 6 at 2. Once the Corps approved this proposal, see PX 7 at 1, the team submitted two price bids, one listing Northrop as the prime contractor, and another, lower bid listing Autek as the prime contractor. Tr. 278 (Lane). The latter was accepted. Tr. 279 (Lane); Tr. 1052-53 (Jensen); see PX 10 at 2. On August 22, 1986, the Corps awarded Autek a competitive firm fixed-price contract for up to 95 testheads, and related equipment, software, and technical data. Stip. 1. The contract,

like the RFP, did not provide for progress payments. Tr. 779-80 (Desmond); Tr. 1053 (Jensen).

Paul Sando of USMC Headquarters was the original contracting officer. PX 8 at 1. Jack Sherman was the supervisory contracting officer. PX 458 at 3, Tr. 736 (Desmond); Tr. 954 (Sando). He has since been convicted for receiving bribes from Whittaker Command and Control Systems, Inc. \2 during this time, for disclosing inside information and influencing the award of Corps contracts to Whittaker. PX 458 at 4, 71-73. The scandal caused by such conduct is popularly referred to as the "III Wind" matter.

The contract originally called for the first two testheads to be delivered to the Marine Corps Logistics Base in Albany, Georgia on June 18, 1987; the next two on August 22; and two additional units each month thereafter. Stip. 5.

However, problems arose between Autek and Northrop, the subcontractor for the software portions of the contract, in the spring of 1987, due to Autek's refusal to make progress payments. Autek argued that Northrop had not made sufficient progress to merit progress payments nor provided adequate documentation of its work, and Northrop claimed Autek had not furnished

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\2 The company was known as Lee Telecommunications Company until it merged with Whittaker in October 1987. PX 44 at 1; PX 458 at 16-17. For the sake of clarity, this opinion will refer to it as Whittaker.

Northrop the necessary hardware (a functioning testhead). Tr. 381-83 (Lane); Tr. 751-53, 789-90 (Desmond); Tr. 956, 978 (Sando); Tr. 1093 (Jensen); see PX 21 at 1; PX 25 at 1; PX 29 at 1; PX 30 at 1-2. The hardware was needed before the software portion of the project could be designed. Tr. 1168 (Jensen).

In June 1987, Autek told the Corps that the first unit would neither be on time nor contain all of the required components, but that the second testhead would be complete. Tr. 1078-79 (Jensen). Autek informed the Corps of further delays at an in-progress review in early July. Tr. 1089-90 (Jensen).

Northrop stopped work on July 29, stating that it could make no further progress until Autek provided it with an adequate testhead, and that it would not resume work until Autek paid the previous invoices and developed a plan for the balance of the program. PX 35 at 1. The Northrop shutdown threatened to delay the entire project. Tr. 1094, 1164-67 (Jensen). Within a week, therefore, the Corps offered Northrop a direct contract for the software, and entered into a letter contract soon thereafter. PX 41 at 1; PX 46 at 2; PX 75 at 1; Tr. 710, 1094 (Jensen).

On August 13, 1987, modification P00007 extended the delivery schedule to make the first testhead due August 18, the second due August 31, and the third due September 30, with two additional units to be delivered each month thereafter. PX 477 at 232. However, Autek did not deliver testhead 1 until August 25, and

delivered testhead 2 on September 22. Stip. 6.

In case no final price agreement could be reached with Northrop, the Corps also considered other options, including contracting with Autek for the software (this was recommended by the Corps's Acquisition Division, but rejected because the technical advisers concluded that it would involve a substantial delay before Autek could perform) and terminating the Autek contract altogether (this too was rejected because it might substantially delay the entire program). Tr. 799-801 (Desmond); Tr. 961-62 (Sando); Tr. 1095-96 (Jensen); PX 49 at 1; PX 57 at 1; PX 76 at 1, 4; PX 82 at 2.

When Northrop's price for the direct contract proved too expensive, the government terminated it in October 1987. Tr. 792 (Desmond); Tr. 933-34 (Went); see PX 48 at 1; PX 50 at 1. In accordance with a recommendation from the technicians, PX 80 at 2-3; PX 82 at 3, Mr. Sando initiated a new round of negotiations with Northrop in February 1988. See PX 86 at 1. About the same time, Sherman proposed awarding Whittaker the software contract (and received a kickback for steering the contract to Whittaker). PX 458 at 6, 12-13, 19, 34, 51. This was accomplished in April 1988 by adding the software to an existing Whittaker contract also under Sherman's supervision. PX 99; Tr. 743 (Desmond).

In November, Autek notified the Corps that testhead 3 would be late. PX 49 at 1; Tr. 425-26 (Lane). Autek argued at trial that the delay was due to design

changes ordered by the Corps. However, the Corps's project manager, Don Jensen, denies making any such requests, Tr. 1164 (Jensen), and the changes were never memorialized in change orders, Tr. 585-86 (Lane). The court finds that no design changes were ordered. Testhead 3 was delivered on or about January 3, 1988. Stip. 6.

Though each testhead was more complete than its predecessor, all three units lacked certain components and functions required by the contract. Tr. 678, 1091-93 (Jensen). Autek promised that it would retrofit them to conform to testhead 4, which would meet all requirements and thus establish the baseline configuration. Tr. 406 (Lane); PX 46 at 3; PX 46A at 1; DX 3 at 1. This promise was incorporated into P00009. DX 5 at 2.

Testhead 4, delivered on March 8, Stip. 7, was the first unit to contain every required module, but it failed testing in major areas. Tr. 680, 1107-08 (Jensen); PX Lola. (Moreover, not every function could be tested, because Autek had not provided adequate instructions and technical information required by the contract. Tr. 1082-86, 1110-13 (Jensen); DX 1 at 134-35.) The USMC rejected it on April 22. PX 103 at 1. Its shortcomings were discussed extensively at an in-progress review in May. Tr. 1113-14 (Jensen); PX 117 at 1.

After more than three months of proposals and counter proposals, see PX 62-68, 73, 83, 85, during which Mr. Sherman threatened to terminate the

contract for default if Autek did not meet the testhead delivery schedule set out in P00007 rather than the slightly extended schedule Autek had proposed for P00009, compare PX 62 at 4 with PX 63 at 8, in light of the company's failure theretofore to deliver a fully functional testhead, PX 68 at 1; PX 72 at 1, modification P00009 was signed by the parties on March 14, 1988, DX 5 at 1-2. It deleted the software and related items from Autek's contract, and incorporated into the contract a revised purchase description (PD), DX 8. DX 5 at 1-3.

Testheads 5 and 6 failed similarly to testhead 4. Tr. 1111 (Jensen); Tr. 1267 (Wallace); PX 117A; PX 124. Testheads 5-24 were delivered between April 1988 and May 1989, Stip. 7, but none satisfied the contractual requirements. When each testhead designated as the baseline failed, a new baseline testhead was targeted: after testhead 4 proved inadequate, the parties targeted testhead 9; when it too failed, testhead 16 was targeted; finally, testhead 25 was targeted. Tr. 1114, 1116, 1119-20 (Jensen). Despite these continuing failures, Mr. Jensen signed unconditional Forms DD-250 ("Material Inspection and Receiving Report") for testheads 1-24 between September 1987 and June 1989. See PX 16 at 6-34. He testified, however, that Autek was aware that the units did not conform to the contract, that he signed the forms only because the parties were negotiating a modification to reflect an agreement by Autek to retrofit them, that Autek knew that the acceptances were conditional on the units being retrofitted, that this was done

because Autek needed the cash flow in order to perform the contract, and that Autek never disputed the existence of such an agreement. Tr. 703, 1115-18, 1149-50 (Jensen); PX 235 at 2. The contracting officer and contract specialist corroborated this testimony. Tr. 737-38, 774 (Desmond); Tr. 1000-01 (Stolark).

On March 14, 1989, administrative responsibility for the contract was transferred to the Marine Corps Research, Development, and Acquisition Command (MCRDAC), PX 167 at 1; Tr. 943 (Carpenter); Tr. 953 (Sando), which proposed a Modification P00012 requiring Autek to propose a plan to correct several specific technical defects (and to retrofit the noncompliant units according to the schedule set out therein). Id. at 6-8. (The technical portions of P00012 had been under discussion for most of a year. Tr. 1115 (Jensen).) Autek responded in May that the problems already had been solved, but acknowledged its obligation to retrofit noncompliant units. PX 182 at 2.

The Corps and Whittaker, in July and August, respectively, concluded that the testheads did not perform certain required functions, and that this inability was due to deficiencies in the units, rather than to a lack of information regarding how to operate them. Tr. 699 (Jensen); PX 218.

On August 22, the Corps rejected testheads 25-27. Stip. 15. Attached to the letter was a report discussing the

testhead's technical deficiencies, PX 237 at 3-13, stating,

> By virtue of waivers to required specifications, the Marine Corps accepted 24 units that failed to meet the specifications ... with the condition that they would be retrofitted to the testhead baseline configuration which will be established as unit #25 under P00012. Upon receipt of unit #25, additional deficiencies were noted and pointed out to Autek via a July 10, 1989 memo from Don Jensen, MCLB, Albany. [PX 197.] The discrepancies were discussed at the August 1, 1989 meeting at Autek between representatives from the Marine Corps and your firm. [Tr. 1133 (Jensen); see PX 214A.] .... Items 12-14 of the enclosure are additional discrepancies which the Government has just recently discovered, so they have not previously been discussed with Autek. The Marine Corps'[s] position is that to date none of the problems cited in the enclosure have been resolved.

PX 237 at 1; see also PX 235 at 2-3.

The letter also noted that the company's continuing delinquency in providing technical information was delaying integration of the larger program, and inhibiting testing. PX 237 at 1; see also Tr. 1128 (Jensen); Tr. 1291-92 (Wallace); PX 235 at 2. No testheads would be accepted until "technical data relating to operation and maintenance of the testhead is delivered, and all nonconformities identified in the enclosure, as well as any additional

problems which may be encountered in the future, have been corrected."PX 237 at 1.

Autek was instructed to submit a plan for curing the deficiencies in the hardware and the delivery of technical information by September 5, or face possible termination of the contract for failure to make progress. Id. at 2.

Autek's September 1 response again argued that the technical deficiencies had already been solved by the various software solutions it had previously proposed. PX 242 at 2-4. On September 12, Autek submitted a plan that did not further address the technical deficiencies, PX 251 at 2-3, and a proposed modification P00012 that omitted any mention of such deficiencies or of any agreement to retrofit noncompliant units, see id. at 8. Throughout August and September, Autek complained to higher officials in the Corps and to Congressmen that the program's problems stemmed from the Corps's failure to integrate Autek's hardware with Whittaker's software, a responsibility originally allocated to Autek but allegedly taken over by the government as the result of modification. See PX 240 at 1-2; PX 241 at 1; PX 244 at 1; PX 251 at 21-22; PX 254 at 1; PX 277 at 1; PX 278 at 1.

On September 12, the Corps rejected testheads 28 and 29, PX 252 at 1, and sent Autek a cure notice listing three conditions "endangering performance of the contract":

> (1) failure to deliver testheads which conform to the specifications in

the subject contract;

(2) failure to deliver technical data which adequately explains the operation and maintenance of the testheads; and

(3) failure to sign modification P00012.

Id. Attached to the notice was the USMC response to Autek's September 1 assertion that the technical issues had been solved. Id. at 5-7. The notice concluded that "the Marine Corps [would be] left with no alternative but termination," unless, by September 27, Autek (1) submitted a detailed plan delineating the process by which Autek would correct the twenty-one technical defects listed in the attachment, (2) provided adequate technical data relating to the operation and programming of the testheads prior to government acceptance of additional units, and (3) signed Modification P00012. Id. at 3-4.

On September 14, three new members of Congress wrote to the Secretary of Defense on Autek's behalf. PX 254. One member followed up with a September 19 letter to the Assistant Commandant of the Marine Corps. PX258.

Autek's September 21 response to the cure notice again argued that its proposed method of resolving the technical discrepancies through solutions supposedly achieved in system software satisfied the contractual performance requirements. Stip. 22; see PX 262A at 12-19. After extensive discussions of the technical issues on September 21 and 22, Modification P00012 was executed.

Stip 23; PX 262. P00012 identified five technical issues in the August 22 attachment that Autek had to resolve in addition to passing the approved acceptance test procedure (ATP). PX 262A at 3. The Corps was given "30 days [after resolution] to test the testhead in totality to include firmware, to insure no other problems are induced or uncovered by the resolution of the above identified issues. If additional issues are found, the government shall have 30 days after correction for retest." Id.

Modification P00012 also stated that testheads 1-24 had been accepted "with the express understanding that the contractor shall implement a solution to any deficiencies (failures to meet the requirements of the contract) and shall retrofit all units previously accepted to assure that all units are functionally identical." Id. It provided for payment for the remaining units as follows:

> The DD 250s for conditional acceptance of Units 25 and 30 will be executed upon presentation after execution of this modification. Conditional acceptance of these units will constitute authorization for payment in full of the unit price.
>
> The DD 250s for conditional acceptance of Units 26-29 will be executed upon presentation after execution of this modification. Conditional acceptance of these units will constitute authorization for payment of 85% of the unit price. The balance of the unit price is payable upon successful

completion of the ATP at MCLB Albany the week of September 25, 1989.

Units 31-44 will be conditionally accepted based on successful completion of the currently approved ATP at MCLB Albany. Conditional acceptance of these units will constitute authorization for payment of 85% of the unit price. The balance of the unit price is payable upon successful resolution of the issues identified in paragraph 2 of this modification.

Id. at 4.

P00012 established an integration working group to provide a forum for the interchange of technical data and information between the parties, but not for the resolution of contractual issues. PX 262A at 5. At the first meeting, on October 4, Autek demonstrated its proposed resolutions to four of the technical issues, and the fifth issue was discussed. Tr. 519 (Lane); PX 285 at 1. (The demonstrations were prepared by Robert Leman, Autek's software engineering manager, Tr. 1250, 1255, 1259 (Leman), who was instructed by Sam McCutcheon, the company's owner, not to prepare solutions that required modifications to the software to the firmware or hardware but only to the software, Tr. 1259 (Leman); see also Tr. 629-34 (Lane).)

On October 24, Gary Gorham, an outside consultant retained by the Corps in September to advise the Corps regarding the testhead problems, Tr. 1159 (Jensen); Tr. 1203-04 (Gorham), reported his

opinion that the proposed solutions were inadequate. DX 17 at 5-6; Tr. 1160 (Jensen); see also PX 351 at 5-8 (December 21 report restating his conclusions).

On November 10, 1989, the Corps issued another cure notice, for Autek's "[f]ailure to make progress in resolving the testhead deficiencies," and its "[f]ailure to complete warranty repairs/ corrections in the time frame required by the contract." PX 313 at 1. As discussed below, the notice rejected Autek's proposed solutions to the five technical issues listed in P00012; it also noticed that ten of the twenty-one deficiencies listed in the September cure notice were not cured, id. at 4-19, and that repairs for units 6, 18, and 19 had exceeded the sixty-day maximum, id. at 1-2. The notice threatened contract termination unless, by December 11, Autek presented a detailed plan of how it would correct all of the cited deficiencies, and repaired all testheads for which repairs had been pending at least sixty days. Id. at 2.

This case depends upon whether the five deficiencies listed in P00012 were contract requirements and, if so, whether Autek cured or could have cured them. The five issues related largely to PD section 3.3.11.1.3.1.c, which required the testhead to "provide programmable features for the following digital scena[r]io[]s as defined by ATLAS [Abbreviated Test Language for All Systems]:

(1) Response Only
(2) Stimulus Only

(3) Stimulus/Response Compare
(4) S[t]imulus/Response Save
(5) Response Compare
(6) Stimulus/Response Match[.]"

DX 8 at 10. These scenarios are sequences of instructions and responses used for testing electronic equipment and developing test programs. Tr. 1123-26 (Jensen).

The first issue was "Resolve the FNC Reset 'glitch' issue on digital and/or hybrid digital pins." PX 262A at 3. Whenever a Function string was sent to the testhead, the testhead momentarily reset the stimulus pins connected to the UUT (i.e., the signal connected to the UUT dropped to 0 volts, then returned to what it had been) before the next command was received. Tr. 156-57 (Stoldt); Tr. 1142 (Jensen); Tr. 1270-71 (Wallace); Tr. 1315 (Haynes); PX 291 at 2. This was inconsistent with the requirement of section 3.3.11.1.3.1.c, DX 8 at 10, that the scenarios be performed in conformance with Atlas, which requires that when a Function string is sent to the testhead, the logical values of the connections to the UUT be maintained until removed by another statement, DX 16 at 4. Tr. 1216 (Gorham). The reset sent the UUT a false data bit, which invalidated the result in tests requiring multiple commands (which was often, because many tests require more patterns than can fit on one load). Tr. 160-61 (Stoldt); Tr. 1126, 1142-43 (Jensen); Tr. 1271, 1273 (Wallace); Tr. 1315-16 (Haynes); PX 237 at 3-4; PX 291 at 2. This affected all of the Atlas scenarios. Tr. 1126 (Jensen).

Autek argued that the reset was an intentional safeguard built in to prevent "hot switching," which could damage the testhead's internal components. PX 291 at 2; see Tr. 164 (Stoldt). The solution the company proposed was for the controller to issue GAL (Go to Alternate Language) instructions to bypass the reset mode. PX 291 at 2-5. (The Function command is in the testhead's primary language, MAIL (Marine Corps Atlas Instrument Language); GAL is an alternate, lower-level language. Tr. 164 (Stoldt); Tr. 1252 (Leman); Tr. 1275 (Wallace); PX 291 at 2; PX 293 at 5; PX 333 at 9. MAIL is similar to CIIL (Control Interface Intermediate Language), Tr. 287, 372 (Lane); Tr. 1217 (Gorham), a language used by the Air Force, with which Autek personnel had experience, Tr. 279, 287 (Lane). Because of this familiarity, the contract was modified at Autek's request to use an Air Force Atlas compiler instead of the specified Navy compiler. Tr. 1059 (Jensen).)

The proposed solution did bypass the reset, Tr. 1218 (Gorham); Tr. 1275, 1288 (Wallace); Tr. 1320 (Haynes), but the Corps rejected it as incompatible with what the Corps viewed as a contractual requirement, that "[t]he correction of testhead performance attributes that are inconsistent with the requirements specified in the PD should be corrected in the testhead design, not the system software external to the testhead." PX 313 at 5; see also Tr. 1218 (Gorham) ("the test[head] should be compatible with the[] controller, not the other way around"). This requirement, which accords

with standard industry practice, Tr. 1065-66 (Jensen); Tr. 1219-20, 1231-32 (Gorham); PX 293 at 9, was drawn from three PD sections. Section 1 (Scope) required the testhead to be compatible with the government-specified controller, DX 8 at 1; however, Atlas, not GAL, was used by the controller. PX 313 at 5. Section 3.3 (Design and Construction) stated, "The design approach shall place sufficient intelligence, command and control functions in the testhead to decrease the communication and lengthy specialized processing workload of the controller," DX 8 at 3; yet the proposed solution actually increased the controller's workload. PX 313 at 5. Finally, section 3.3.9 (Other Features) required Autek to "provide the necessary software algorithms ... to support all testhead operation and functions," DX 8 at 5, whereas Autek's proposed solution relied on software external to the testhead, PX 313 at 5-6. \3

Moreover, according to Dr. Leonard Haynes, who inspected and tested testhead

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\3 Autek's expert witness, Craig Stoldt, disagreed, stating that this solution, and those proposed for the other technical issues, satisfied the PD. Tr. 166-74, 182-201, 205-06 (Stoldt). The court found defendant's experts, particularly Dr. Leonard Haynes, far more persuasive, in terms of both background and familiarity with the case. For example, Mr. Stoldt never read the computer program specifications, Tr. 231-32 (Stoldt), which in this case functioned as a de facto operating

25 (and reviewed the documentary evidence) in preparation for his testimony, Tr. 1286 (Wallace); see Tr. 1313-14 (Haynes), the syntax Autek provided could not cause hot switching; even if it could, hot switching posed little threat of damage to the components, and thus should not be a rationale for not complying with Atlas. Tr. 1317-20 (Haynes); PX 467 at 1.

Also, using GAL would cause the testhead to lose certain high-level capabilities involving MAIL commands; to compensate, the compiler's software would then have to duplicate most of the testhead's firmware, because the compiler would be performing the testhead's functions, slowing the testhead down. Tr. 1220 (Gorham); Tr. 1321-22 (Haynes). Indeed, Autek itself had cautioned the Corps in 1988 that GAL was "primarily for debugging purposes," and its use required "extreme care," DX 9 at 2 (computer program specification dated November 28, 1988), and Mr. Leman testified that improper use of GAL could damage the testhead or the UUT. Tr. 1253 (Leman). Autek's proposed solution also was inefficient in that the testing of some UUTs would require additional equipment,

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\3 (contd.) manual, Tr. 1181-84 (Jensen). Also, Mr. Stoldt's experience with the subject matter of the contract was more limited. Dr. Haynes, on the other hand, has a Ph.D in Electrical Engineering and Computer Science, Tr. 1302 (Haynes), and was a member of the committee that wrote the Atlas standards, Tr. 1303-04 (Haynes).

Tr. 1276-78, 1288-89 (Wallace), and would require additional knowledge on the part of the testhead operator, Tr. 1322-23 (Haynes).

The second issue listed in P00012 was "Resolve the RSPC1 for RONL scenario." PX 262A at 3. Response Only is one of the six scenarios specified in PD section 3.3.11.1.3.1.c. DX 8 at 10. "Response Count of One for Response Only" means that the testhead must detect a single response following a single stimulus in a single step. Tr. 178 (Stoldt); Tr. 1143-44 (Jensen). The Corps found that the testhead could not do this. Tr. 1143-44 (Jensen). That was because the testhead offset the error memory address by one unit from the stimulus memory address (i.e., the response to a stimulus was recorded one address later than the stimulus address). This resulted in uncorrelated data, DX 17 at 5; Tr. 178-82 (Stoldt), which invalidated the test results.

Autek's proposed solution, to use two Initiate commands, instead of the usual single command, see PX 313 at 7; DX 17 at 5, was rejected because the second Initiate command was a false data bit that violated the Atlas compatibility requirement of maintaining the UUT's state. PX 313 at 7; Tr. 1143-44 (Jensen). It also increased the controller's workload, in violation of section 3.3, and required software algorithms external to the testhead, in violation of section 3.3.9. PX 313 at 7. Similarly, the proposed solution fell short of the requirement in section 3.3.11.1.1.1 (Central Processor Unit) that the

testhead manage internal data handling and transfers, DX 8 at 8. PX 313 at 7. Finally, the proposed solution created new problems, such as additional user clock outputs. Id. at 7-8. Moreover, using two Initiate commands would require a different setup, which would cut the testhead's speed in half---not just for this scenario, but for all functions. Tr. 1326-29 (Haynes).

The third issue listed in P00012 is "Resolve the REM GAL command." PX 262A at 3. This is related to the previous issue, and caused by the same defect. Tr. 185-87 (Stoldt); Tr. 1144 (Jensen); Tr. 1279 (Wallace); DX 17 at 6. The Read Error Memory command produced erroneous data, because, instead of storing an error bit in the memory address corresponding to the stimulus that caused the error, the testhead stored the error bit in the memory address designated by the stimulus address plus one. PX 262A at 15; PX 291 at 8. Autek's proposed solution was to instruct the controller, via software, to look at the memory address subsequent to the relevant stimulus address, instead of the analogous address. PX 291 at 8; PX 293 at 5-6; Tr. 187 (Stoldt). This was rejected for the same reasons as the previous proposed solution. PX 313 at 9.

The fourth issue listed in P00012 is "Resolve the FTH ERRO command." PX 262A at 3. This problem also was related to the second deficiency. Tr. 189 (Stoldt); Tr. 1145 (Jensen); Tr. 1280 (Wallace); PX 313 at 11; DX 17 at 6. The Fetch Error command, which was supposed to retrieve specific errors, produced unpredictable data in the last error, again because the

correct data appeared in an unexpected address. Tr. 1280-83 (Wallace); PX 291 at 10. Autek's proposed solution was either to issue two bytes of dummy stimuli at the end of each load set, and discard the resultant errors; or to use the REM GAL command instead of FTH ERRO. PX 291 at 8; PX 293 at 6. The Corps rejected the use of dummy stimuli for the same reasons that it rejected the proposed solution to the previous issue, PX 313 at 11-12. Also, the issuance of dummy stimuli at the end of each digital pattern conflicted with the Atlas requirement of maintaining the state of the UUT, caused the testhead to fall short of the RAM depth required in the purchase description, DX 8 at 21, and created additional problems. PX 313 at 12; Tr. 1148 (Jensen); Tr. 1284-86 (Wallace); Tr. 1374-75 (Haynes).

The final issue listed in P00012 is "Demonstrate method for stop on STIM-RES-MATCH." PX 262A at 3. The testhead could not perform the Stimulus/Response Match scenario, i.e., could not stop when the output matched the expected output, Tr. 197 (Stoldt); Tr. 1330 (Haynes); PX 168 at 4, when seeking matches for a list of elements (the list function), rather than for a single element (the value function). PX 291 at 12. The ability to stop on a match is necessary to initialize the UUT, i.e., to bring it into a known state at the beginning of a test. Tr. 198-99 (Stoldt); Tr. 1125-27 (Jensen); Tr. 1223 (Gorham); Tr. 1335, 1350 (Haynes). Autek's approach was to have the testhead issue the stimuli, but make the controller (as instructed via software) evaluate the output for a

match. PX 291 at 12; PX 293 at 8; Tr. 197-98 (Stoldt). PX 291 at 13.) This was rejected as inconsistent with the same PD provisions underlying the rejection of the solutions proposed to the three previous issues. PX 313 at 13. Also, this solution was ineffective, in that initialization is a random process, which may not produce the same match (i.e., achieve the desired state) at the same point in successive runs. Tr. 1154, 1156 (Jensen); Tr. 1351 (Haynes). Finally, allocating the evaluation function to the system software would result in unacceptably long run times. Tr. 1162 (Jensen); Tr. 1223-24 (Gorham); Tr. 1331-32 (Haynes); PX 293 at 8. Indeed, the Corps reached this conclusion as early as March 1989, see PX 168 at 4, as had Mr. Leman, who so informed his boss, Mr. McCutcheon, Tr. 1262-63 (Leman).

Of the deficiencies listed in the cure notice beyond those appearing in P00012, the most significant was that the testhead did not stop on a non-compare, or error, as required by section 3.3.11.1.3.1.b (High Speed Digital Capability), DX 8 at 10. PX 313 at 15; Tr. 1377 (Haynes). The testhead did not stop within the same stimulus cycle as the one in which a non-compare occurred; rather, when it stopped at all, it stopped on the test pattern following the error. PX 313 at 15; Tr. 1163 (Jensen); Tr. 1352 (Haynes). Stopping on an error is essential for debugging purposes. Tr. 213-14 (Stoldt); Tr. 1350-52, 1359 (Haynes). Autek's proposed solution was, because the error was recorded, to have the controller re-run the test to the point where the error occurred. Tr. 214

(Stoldt). This was not an effective solution, however, because it could require redoing hours of testing, and because many errors do not occur every time the same stimulus is entered (i.e., repetition of the same input does not always result in the same output). Tr. 1353-56 (Haynes).

Mr. Gorham testified that all of these deficiencies, except the reset glitch, were tied to the fact that the testhead contained only a single clock to govern both the stimulus address and the response address. Tr. 1222, 1226, 1235 (Gorham). He recommended terminating the contract, because the testheads required an additional clock for response addresses, and Autek appeared unwilling to make any hardware changes, as opposed to software remedies. Tr. 1205-09, 1225-26, 1233-34 (Gorham). Mr. Leman also had advised Mr. McCutcheon that one clock would be insufficient, but Mr. McCutcheon replied that he would take a "calculated risk" that the testhead would function correctly with only one clock. Tr. 1256-57 (Leman); see also PX 144 at 1.

The clock had been discussed between the parties as early as the post-award conference, where Autek asked why the PD required the signal width, sensor delay, and slope (polarity) of the stimulus clocks to be programmable, DX 1 at 44-45, 69, and the Corps explained why it wanted programmability. Tr. 1061-62, 1067-68, 1174-77 (Jensen); PX 15 at 4-5. The Corps rejected the suggestion in Autek's subsequent technical proposal to delete the requirement. PX 15 at 4-5; Tr. 330-332 (Lane); Tr. 1060, 1173 (Jensen); see

PX 11 at 5-6. Autek's more recent justification, not raised at that time, Tr. 568-69, 575-80 (Lane); Tr. 1074, 1100 (Jensen), is that the testhead had a minimum 50 nanosecond response monitor window, i.e., that the sensor had to remain open for the period, and then close simultaneously with the output of the next stimulus, leaving no processing time in between to determine whether the response was a match or an error, and thus requiring an extra step when the testhead ran at its maximum speed of 10 megahertz (because 50 nanoseconds for the delay plus 50 nanoseconds for the window would consume the entire 100 nanoseconds per cycle available at 10 megahertz). Tr. 352, 525 (Lane); Tr. 1213 (Gorham); see PX 394 at 8. Dr. Haynes testified that this was an unreasonable interpretation of the PD, and that it had such negative consequences for the testhead that the company should have consulted with the Corps before adhering to it. Tr. 1338-41 (Haynes).

Mr. Gorham found, moreover, that the testhead had no response monitor window; i.e., the sensors latch within nanoseconds of being strobed to activate, rather than remaining open for some period before closing. Tr. 1212-15 (Gorham); see also Tr. 1340-41 (Haynes). Time is therefore available for processing the data. Tr. 1215 (Gorham).

Of the remaining additional deficiencies (beyond the five listed in P00012) listed in the cure notice, one group dealt with the testhead pins. First, PD section 3.3.11.1.5.2.c required that the pins be independently

programmable---i.e., that the opening or closing of one should not mandate the opening or closing of another, DX 8 at 13. Nevertheless, closing a pin in the Autek testhead resulted in the adjacent pin opening. PX 313 at 15; Tr. 1363 (Haynes). Second, section 3.3.11.1.5.3.d required that any or all of the interface patch panel pins be connectable to the input/output pin, DX 8 at 15, yet all of the pins could not be connected at the same time. PX 313 at 15; Tr. 1372 (Haynes). Finally, the hybrid pins could not be placed in a high impedance state, as required by section 3.3.11.1.3.10.b, DX 8 at 12. PX 313 at 18; Tr. 1368-69 (Haynes). (The court will not address the other deficiencies.)

While awaiting Autek's response to the cure notice, the Marines assessed their options, including terminating the contract, negotiating a price reduction and using the surplus to pay another contractor to repair the units (which was later determined not to be feasible because of inadequate technical documentation of the problems, PX 366 at 4), and paying Autek to repair the units (the "least desirable scenario since we have absolutely no assurance that they have the ability or the inclination to deliver usable products"). PX 316 at 1.

Autek responded through counsel to the November cure notice on December 7. The letter did not offer a plan for remedying technical defects (other than to repeat the rejected solutions); instead, it argued that Autek did not have to correct the defects because they were caused not by the company, but by deficiencies in

the software, and the decision to delete the software from the contract. PX 335 at 3-6. On December 8, Autek noted that units 6, 18, and 19 had by then been repaired and returned to the Corps. PX 337 at 1.

Technical experts from the Naval Aviation Depot were asked to evaluate the situation. Tr. 834 (Bass); Tr. 897 (LaBoone). In December, they reported their opinion that some of Autek's proposed solutions were arguably acceptable, and recommended further efforts to clarify and close the technical issues, PX 346 at 6; PX 350 at 6-10, but in January, they concurred in terminating the contract, PX 358 at 1, as did the Navy Competition Advocate General, PX 365 at 2.

Units 39-42 were delivered between December 7, 1989 and January 19, 1990, but never accepted. Stip. 7. In addition, Autek received full payment for testhead 32 (which had been accepted on November 14, PX 16 at 42) on December 11, and for testhead 35 (accepted on December 4, PX 16 at 43) on January 3. Stip. 44, 49. (The DD-250 for unit 35 was the only post-P00012 acceptance not marked "Conditional Acceptance IAW [in accordance with] Contract Modification P00012." See PX 16 at 35-43.) On January 10, the company submitted a certified claim for $998,923.40, eighty-five percent of the contract price for testheads 33-34 and 36-39. PX 364 at 9. (This claim was denied on February 28, on the grounds that those units were never unconditionally accepted. PX 399 at 1.)

Also on January 10, one of the Congressmen wrote to the Secretary of the Navy to protest the proposed termination. PX 363 at 1. On January 19, Autek's counsel asked the Secretary's Deputy General Counsel to accept the testheads that already had been delivered. PX 369 at 1.

On January 11, 1990, the Contracts Division Review Board approved the proposed termination. PX 366 at 1. After the Secretary of the Navy authorized termination, Tr. 1024, 1029 (Stolark), the contract was terminated for default on January 24, on the grounds that Autek's failure to submit an acceptable plan for correcting the technical deficiencies listed in the November cure notice constituted a failure to make progress endangering performance of the contract, PX 373 at 1. The termination was signed by E.J. Stolark, head of MCRDAC's Contracts Division, because the matter had become politically sensitive. Tr. 1025 (Stolark).

Also on January 24, Autek filed a supplemental response to the cure notice (its response had been due December 11, PX 313 at 2). The supplement contained technical information about the effect of splitting the contract. For the first time since these issues were raised, Autek suggested to the contracting officer that it would be willing to implement different solutions ("If the Marine Corps wants a different implementation, it should so specify.... Other resolutions are possible, but we have not received the information necessary from the Marine Corps to

perform as apparently desired."). PX 371 at 2; see Tr. 1157-58 (Jensen). (Dr. Lane made a similar suggestion to the Competition Advocate General on December 6, PX 334 at 1, and Autek's counsel implied as much to the Deputy General Counsel on January 19, PX 369 at 1.)

On January 25, the Corps asserted a claim against Autek for $6,454,565.10, to recover the amount paid for noncompliant testheads. PX 374 at 1. (In fact, the government paid the full contract price, $196,486, DX 1 at 3, for each of 33 testheads, Stip. 7, for a total of $6,484,038.) \4

Plaintiff filed suit on July 30, seeking rescission of the termination for default, or conversion to termination for convenience; and the granting of its, and denial of the government's, monetary claims. (The complaint also sought the money that Autek would have received had it been allowed to complete the contract, including lost profits and contract costs, and other consequential damages, but the court lacks jurisdiction over this claim, for it was not first presented to the contracting officer. \5

\4 The government now seeks the corrected sum. This is permissible. **Tecom, Inc. v. United States**, 732 F.2d 935, 937-38 (Fed. Cir. 1984); **SMS Data Prods. Group. Inc. v. United States**, 19 Cl. Ct. 612, 615-16 (1990).

\5 On November 18, 1991, Autek submitted a certified claim to the contracting officer for full payment for

Scott Aviation v. United States, 953 F.2d 1377, 1378 (Fed. Cir. 1992).) Defendant counterclaimed for its January 25 refund claim. \6

\5 (contd.) testheads 33-34 and 36-42, and approximately $450,000 for technical data and training the company claimed to have provided. The contracting officer declined to issue a decision regarding testheads 33-34 and 36-39, because that portion of the claim duplicated the previously denied claim, which was the subject of pending litigation (the present suit) and thus could be decided only by the Attorney General, and rejected the rest of the claim on June 7, 1993. Autek filed suit on August 9, but the court dismissed the complaint, on the grounds that the 1991 claim was encompassed by the current complaint, depriving the contracting officer of authority to issue a valid decision on the claim, and thus leaving the court without a decision to review. **Autek Sys. Corp. v. United States**, No. 90-497C, slip op. at 3 (Fed. Cl. Jan. 14, 1994) (citing **Sharman Co. v. United States**, 2 F.3d 1564, 1568-72 (Fed. Cir. 1993)).

\6 On March 29, the Corps asserted a second claim against Autek, for shipping ($987) and subsequent storage costs ($25.69 in San Jose, and $3.67 per day in government storage) incurred after the company refused to accept return delivery of units 33-34 and 36-42. PX 410 at 1. This claim also was the basis of a counterclaim in this court, but defendant offered no evidence of these costs. A litigant in this court may recover only

Discussion

Default Termination

Autek argues that, for a number of reasons, the decision to terminate the contract for default was an abuse of discretion, the remedy for which is conversion of the termination to one for convenience, **Malone v. United States**, 849 F.2d 1441, 1445 (Fed. Cir.), corrected, 857 F.2d 787 (Fed. Cir. 1988); **Darwin v. United States**, 811 F.2d 593, 597 (Fed. Cir. 1987). The government bears the burden of proving, by a preponderance of evidence, that the default termination was justified. **Lisbon Contractors, Inc. v. United States**, 828 F.2d 759, 765 (Fed. Cir. 1987); **Mega Constr. Co. v. United States**, 29 Fed. Cl. 396, 414 (1993)

Autek's primary contention is that Modification P00009, which removed the software items from the contract, is void and unenforceable, and that Autek therefore should not be held accountable for failing to perform according to its terms. Plaintiff contends that the modification was void because it was

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\6 (contd.) actual damages and must furnish evidence by which they can be calculated. **Grant v. United States**, 74 U.S. 331, 338 (1868); **Mayor of New York v. Ransom**, 64 U.S. 487, **490-91 (1859); Gold Bondholders Protective Council, Inc. v. United States**, 676 F.2d 643, 645 (Ct. Cl.), cert. denied, 459 U.S. 468 (1982). Defendant did not do so; therefore, the court grants summary judgment to plaintiff on the second counterclaim.

tainted by Mr. Sherman's criminal acts, relying on **Godley v. United States**, 5 F. 3d 1473 (Fed. Cir. 1993): "In general, a Government contract tainted by fraud or wrong-doing is void ab initio." Id. at 1475.

The **Godley** rule does not, however, apply to P00009 because, as plaintiff concedes, the record discloses no causal link between the agent's fraud and this modification. \7 Plaintiff's Post Trial Brief at 13. "Illegal acts by a Government contracting agent do not alone taint the contract and invoke the void ab initio rule. Rather, the record must show some causal link between the illegality and the contract provisions." **Godley**, 5 F.3d at 1476. Plaintiff presented no evidence that Mr. Sherman in any way instigated the problems between Autek and Northrop that led to P00009, nor that he did more than capitalize on the existing situation when, the following year, he proposed awarding the software contract to Whittaker.

Also, the rule at issue in **Godley** is not a contractor defense. Instead, it protects "the general public," **United States v. Mississippi Valley Generating Co.**, 364 U.S. 520, 548 (1961), i.e., "the public fisc," **Godley**, 5 F.3d at 1475, from paying the costs associated with

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\7 Mr. Sherman was on plaintiff's original witness list, but was not called to testify. (Nor did plaintiff call a listed expert, or three former Autek employees, who were to testify about the technical issues.)

contracts tainted by government officers' wrongdoing by allowing the government to "rid itself," **United States v. Acme Process Equip. Co.**, 385 U.S. 138, 146 (1966), of such contracts. See also, e.g., **Mississippi Valley**, 364 U.S. at 563-65; **K & R Eng'g Co, v. United States**, 616 F.2d 469, 473-74 (Ct. Cl. 1980). Autek has cited, and the court has found, no authority allowing a contractor to wield this rule to prevent enforcement of a contract.

The record also does not support Autek's contention that P00009 is void because Mr. Sherman's threats to terminate the contract constituted economic duress. Mr. Sherman threatened termination while P00009 was pending for Autek's failure to adhere to the production schedule, not for its failure to sign the modification. See PX 68 at 1; PX 72 at 1. These letters do not even mention P00009. Moreover, it does not constitute economic duress to broach the subject of termination to a contractor actually at risk of defaulting. See **Liebherr Crane Corp. v. United States**, 810 F.2d 1153, 1158 (Fed. Cir. 1987).

Nor did splitting off the software items render performance of the hardware portion of the contract impossible. The doctrine of impossibility generally does not even apply when the purported obstacle is caused by the obligee; rather, the question is whether the obligee has breached the contract so as to discharge the obligor's duty to perform. Restatement (Second) of Contracts § 261 cmt. b (1981). As implied

by the foregoing, Mr. Sherman's conduct did not breach this contract.

Even if the doctrine of impossibility were relevant, it would not aid plaintiff here. While "[t]he legal use of the term 'impossibility' has long included more than absolute impossibility," it does require, at a minimum, "impracticability because of extreme and unreasonable difficulty, expense, injury, or loss involved." **Foster Wheeler Corp. v. United States**, 513 F.2d 588, 594 (Ct. Cl. 1975) (quoting Restatement of Contracts § 454 (1932)). The doctrine may not be "'invoked merely because costs have become more expensive than originally contemplated,' but 'may be utilized only when the promisor has exhausted all its alternatives, when in fact it is determined that all means of performance are commercially senseless'; and, the burden of proof in this respect is upon plaintiff." **Piasecki Aircraft Corp. v. United States**, 667 F.2d 50, 62 (Ct. Cl. 1981) (quoting. **Jennie-O Foods, Inc. v. United States**, 580 F.2d 400, 409 (Ct. Cl. 1978)).

Autek did not exhaust all of its alternatives, and has not proven that employing a hardware solution to the testheads' defects would entail extreme and unreasonable difficulty or expense. It may well have been impossible to satisfy the contract by Autek's preferred method, but the defense is not available to an obligor whose own choice created the impossibility. **W.R. Grace & Co. v. Local Union 759**, 461 U.S. 757, 767 & n.10 (1983).

Next, Autek argues that the default was premature, apparently contending that time remained for the company to revise its proposed solutions under P00012, because this contemplated an opportunity for "correction" of any problems discovered in the contractor's proposed technical solutions. PX 262A at 3. However, the December 7 letter from Autek's attorney responding to the November cure notice's identification of problems in the proposal included no technical revisions or corrections, but only the contention that the testheads already complied with the PD. PX 335 at 5.

When a contractor "refuses to perform his contract, and before the time arrives for performance distinctly and unqualifiedly communicates that refusal to the other party, that other party can, if he choose, treat that refusal as a breach and commence an action at once therefor." **United States v. DeKonty Corp.**, 922 F.2d 826, 828 (Fed. Cir. 1991) (quoting **Dingley v. Oler**, 117 U.S. 490, 499-500 (1886)). The court concludes that the December 7 letter "under a fair reading 'amounts to a statement of intention not to perform.'" Restatement (Second) of Contracts § 250 cmt. b (1981) (quoting U.C.C. § 2-610 cmt. 2). Thus, even assuming that time remained when the contract was terminated for Autek to revise its solutions per P00012, Autek anticipatorily repudiated its obligation to do so when it insisted that the proposed solutions already satisfied its contractual obligations, and this entitled the Marines to proceed, accordingly, to terminate the contract.

Plaintiff also contends that the Corps's silence after the company responded to the second cure notice constituted an election to waive the default, which ends the government's right to terminate a contract without first establishing a new contractual deadline. Such an election is shown by "(1) failure to terminate within a reasonable time after the default under circumstances indicating forbearance, and (2) reliance by the contractor on the failure to terminate and continued performance by him under the contract, with the Government's knowledge and implied or express consent." **DeVito v. United States**, 413 F.2d 1147, 1154 (Ct. Cl. 1969).

Even if the period from default (December 7) to termination (January 24) was unreasonably long, see id. at 1154 (holding an identical period unreasonable); but see **H.N. Bailey & Assocs. v. United States**, 449 F.2d 376, 384 (Ct. Cl. 1971) (how long is reasonable depends on the individual circumstances), Autek's argument fails under **Panoramic Studios, Inc. v. United States**, 413 F.2d 1156 (Ct. Cl. 1969). The contractor there responded to a show cause notice by stating that the rejected goods complied with the contract, and then inquired about the contract's status. The contracting officer replied that headquarters was evaluating the situation. The contractor then protested to the Comptroller General, who declined to intervene. The contract was terminated soon thereafter. Id. at 1161-62. The Court of Claims found that by "attempting to secure relief from sources other than

the contracting officer," the contractor showed its awareness that termination was being considered, and thus did not rely on the failure to terminate sooner. Id. at 1162, 1164.

Similarly, Autek knew from the cure notice that the Corps was considering termination and, both before and after the notice, attempted to secure relief from sources other than the contracting officer. Thus, Autek did not rely on the government's failure to terminate the contract sooner. No waiver of the government's right to terminate can be found where, as here, "the record . . . affords no rational basis for concluding that the plaintiff could have failed to recognize that a default termination was very much in contemplation." **Pelliccia v. United States**, 525 F.2d 1035, 1043 (Ct. Cl. 1975).

Plaintiff contends that the termination was premature because time remained to satisfy the production schedule, and that the deletion of the software from the contract, the Corps's direct negotiation with Northrop, and the Corps's failure to coordinate the software and hardware contracts all constituted grounds for excusable delay. These arguments misperceive the basis for the default termination. The contract was terminated, not for failure to deliver, but for Autek's failure (indeed, refusal) to propose acceptable technical solutions to the delivered testheads' problems. Such arguments relating to the need for additional time for production provide no defense or explanation for the company's failure to develop a technical plan. See

A.B.G. Instr. & Eng'g Inc. v. United States, 593 F.2d 394, 404 (Ct. Cl. 1979).

The argument that Autek substantially complied with the contract also misses this point. It is incorrect, as well, because substantial compliance requires that the contractor have "reasonable grounds to believe that his delivery would conform to contract requirements," and that the defects be "minor in nature and extent," **Radiation Technology, Inc. v. United States**, 366 F.2d 1003, 1006 (Ct. Cl. 1966). Even if Autek could satisfy the first element, the testheads contained defects that were anything but minor. Both sides' expert witnesses agreed that Stop on Match and Stop on Error are crucial functions, the absence of which renders the testheads unfit for their intended use. Tr. 198-99, 213-14 (Stoldt); Tr. 1223 (Gorham); Tr. 1335, 1350-52, 1359 (Haynes). This is not substantial compliance. See, e.g., **Tyger Constr. Co. v. United States**, 31 Fed. Cl. 177, 244 (1994).

Nor does the court accept the argument that the testheads' unsatisfactory performance of these functions was excusable as a product of Autek's compliance with clock specifications. The court need not determine the correct interpretation of those specifications, for even if Autek is correct that they called for a response monitor window, such a requirement conflicted with the proper performance of these and other testhead functions also required by the specifications. A contractor must seek clarification of conflicting specifications from the government,

rather than resolve the patent ambiguity unilaterally. **Hensel Phelps Constr. Co. v. United States**, 886 F.2d 1296, 1299 (Fed. Cir. 1989); **J.B. Steel. Inc. v. United States**, 810 F.2d 1139, 1141 (Fed. Cir. 1987).

Finally, Autek argues that it should be relieved of the default termination because the Corps failed to provide adequate guidance. While the government may not actively or passively mislead a contractor into adopting an incorrect contract interpretation, **Malone**, 849 F.2d at 1445-46; **Chris Berg, Inc. v. United States**, 455 F.2d 1037, 1050-51 (Ct. Cl. 1972), the government is not required, as Autek appears to assume, see Plaintiff's Proposed Findings of Law at 45, 70-71, to set out in precise detail the exact steps necessary to perform the contract. In short, the Corps did not have to design the testheads for Autek; it only had to provide information sufficient for Autek to proceed on its own. See **PBI Elec. Corp. v. United States**, 17 Cl. Ct. 128, 132-34 (1989). The Corps did so, in the specifications as well as by specifically identifying the testhead's defects, and explaining why these were unacceptable, in meetings, memoranda, and cure notices.

Further, there was testimony from Autek's president and key technical employees that Autek recognized that its design was faulty, and that it could have corrected the defects, but chose not to because it did not want to incur additional costs.

Refund Claim

Plaintiff argues that units 1-32 and 35 were accepted, barring the government's refund claim. Generally, acceptance by the government is final and conclusive, see **Instruments for Industry, Inc. v. United States**, 496 F.2d 1157, 1161 (2nd Cir. 1974); **McQuagge v. United States**, 197 F. Supp. 460, 470 (W.D. La. 1961), but FAR § 52.246-2 (Inspection of Supplies---Fixed-Price)(1986) \8 provides an exception for "latent defects, fraud, gross mistakes amounting to fraud, or as otherwise provided in the contract." FAR § 52.246-2(k) (1986) (emphasis added). Modification P00012 "otherwise provided," stating, "The government accepted units #1 through #24 with the express understanding that the contractor shall implement a solution to any deficiencies (failures to meet the requirements of the contract) ...." PX 262A at 3.

A contractor may waive its contractual rights via a modification, see, e.g., **Warren Bros. Roads Co. v. United States**, 105 F. Supp. 826, 829 (Ct. Cl. 1952), and the court so interprets P00012. A contrary reading would render the statement in the modification largely meaningless, a result to be avoided, **Mason v. United States**, 615 F.2d 1343,

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\8 Incorporation of this provision was required by regulation, see FAR § 46.302 (1986), so the clause shall be read into the contract. **General Eng'g & Mach. Works v. O'Keefe** 991 F.2d 775, 779-80 (Fed. Cir. 1993).

1348 (Ct. Cl.), cert. denied, 449 U.S. 830 (1980).

Nor are the DD-250s for units 25-32 conclusive, for each states that acceptance is conditional. While Autek now disputes this, the company previously argued, before termination, that the Corps could safely accept (and pay for) the outstanding testheads precisely because acceptance was conditional: "Modification 12 . . . provides that any acceptance of testheads by the Marine Corps is conditional. The risk, therefore, to the government is virtually nil." PX 369 at 1 (January 19, 1990 letter to Navy Deputy General Counsel). The January 19 letter also shows that Autek knew acceptance of unit 35 was conditional, even though the form for that testhead bore no such notation. The parties' pre-litigation interpretation of the contract is entitled to great weight. **LaCrosse Garment Mfg. Co. v. United States**, 432 F.2d 1377, 1388 (Ct. Cl. 1970); **Maxwell Dynamometer Co. v. United States**, 386 F.2d 855, 870 (Ct. Cl. 1967).

Plaintiff also contends that the Corps constructively accepted the testheads. Constructive acceptance occurs "when the buyer does any act inconsistent with the seller's ownership. The most common act which falls under this provision is the retention and use of the goods by the buyer." **John C. Kohler Co. v. United States**, 498 F.2d 1360, 1367 (Ct. Cl. 1974). Retaining goods for testing, **Figueroa v. Kit-San Co.**, 845 P.2d 567, 576-77 (Idaho App. 1992); **United Air Lines v. Conductron Corp.**, 387 N.E.2d 1272, 1282 (III. App. 1979), or

because the seller has promised to repair defects, **Farrell v. Brandjten & Kluge, Inc.**, 107 A.2d 695, 699 (Pa. Super. 1954), however, is not constructive acceptance. \9 There is no question the testheads were not used, and were unusable.

FAR § 52.246-2 also states,

> If acceptance is not conclusive for any of the reasons in paragraph (k) hereof, the Government, in addition to any other rights and remedies provided by law, or under other provisions of this contract, shall have the right to require the Contractor (1) at no increase in contract price, to correct or replace the defective or non-conforming supplies ... or (2) within a reasonable time after receipt by the contractor of notice of defects or nonconformance, to repay such portion of the contract as is equitable under the circumstances if the Contracting Officer elects not to require correction or replacement.

FAR § 52.246-2(1) (1986). The record shows that the Corps tried the first option unsuccessfully. Under the second option, it is "equitable under the circumstances" to require repayment of the entire amount paid for the testheads

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\9 These cases were decided under the Uniform Commercial Code, which is a proper source of guidance in public contract disputes, **Northern Helex Co. v. United States**, 455 F.2d 546, 553 (Ct. Cl. 1972).

because, as noted above in connection with Autek's claim that the testheads substantially complied with the PD, the testheads were not fit for their intended purpose. Thus, defendant is entitled to $6,484,038.

Conclusion

For the reasons stated above, the court finds for the defendant on plaintiff's claims and defendant's first counterclaim, and for the plaintiff on defendant's second counterclaim. The clerk is ordered to enter judgment in favor of defendant in the amount of $6,484,038.

s/ Diane G. Weinstein

DIANE GILBERT WEINSTEIN
Judge, U.S. Court of
Federal Claims

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

No. 90-710 C

AUTEK SYSTEMS CORPORATION,

JUDGMENT

v.

THE UNITED STATES

Pursuant to the court's order of October 14, 1994,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiff's complaint and defendant's second counterclaim are dismissed, and that defendant recover on its first counterclaim, of and from Autek Systems Corporation, the sum of $6,484,038.00.

David A. Lampen
Clerk of Court

October 24, 1994 By:s/ T.L. Wilson
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 72, re number of copies and listing of all plaintiffs. Filing fee is $105.00.

UNITED STATES COURT OF APPEALS FOR THE
FEDERAL CIRCUIT

**NOTICE OF ENTRY OF
JUDGMENT ACCOMPANIED BY OPINION**

OPINION FILED AND JUDGMENT ENTERED: 03/22/96

The attached opinion announcing the judgment of the court in your case was filed and judgment was entered on the date indicated above. The mandate will be issued in due course.

Information is also provided about petitions for rehearing and suggestions for rehearing in banc. The questions and answers are those frequently asked and answered by the Clerk's office.

No costs were taxed in this appeal.

Exhibits and visual aids shall be promptly retrieved by the party that lodged them with this court.

FRANCIS X. GINDHART
Clerk

cc: DONALD C. HOLMES
SHALOM BRILLIANT

AUTEK SYSTEM V. US, 95-5013
CFC - 90-710C

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

95-5013

AUTEK SYSTEM CORPORATION,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

DECIDED: March 22, 1996

Before ARCHER, Chief Judge, RICH, and LOURIE, Circuit Judges.

ARCHER, Chief Judge.

Autek Systems Corporation (Autek) appeals the judgment of the United States Court of Federal Claims, Autek Sys. Corp. v. United States, No. 90-710C (Ct. Fed. Cl. Oct. 24, 1994), sustaining the government's termination for default of Autek's contract with the United States Marine Corps and granting the government's counterclaim for refund of amounts paid for the delivery of defective goods. We affirm-in-part, vacate-in-part, and remand.

BACKGROUND

On August 22, 1986, Autek contracted with the Marine Corps to manufacture electronic testheads, a microprocessor-based device that tests electronic components. The testheads are an integral part of the Marine Corps Automated Test Equipment System (MCATES). The contract required the production of 95 testheads and related equipment, software, and technical data. Under the terms of the initial contract, Autek was responsible for the hardware component of the contract, while the Northrop Corporation (Northrop) was to develop the software component as a subcontractor under Autek's contract.

Due to coordination problems with Northrop, Autek failed to meet the initial delivery schedule. As disputes continued between Autek and Northrop, the Marine Corps terminated the software portion of Autek's contract and entered into a direct contract with Northrop. Eventually, however, the contract with Northrop was terminated. Following this termination, the supervisory contracting officer, Jack Sherman, was instrumental in causing an award of the software contract to Whittaker Command and Control Systems, Inc. (Whittaker). Mr. Sherman was subsequently convicted of receiving a bribe to steer this software contract to Whittaker.

Despite the initial delays in deliveries, from September 1987 to June 1989, Autek delivered and the Marine Corps accepted testheads 1-24. During this period of time, however, the Marine

Corps determined that the delivered testheads had deficiencies and began to reject subsequent testheads for the failure to meet contract specifications. Due to the noncompliance, on September 12, 1989, the Marine Corps issued a cure notice. After extensive discussions, the parties entered into Modification P00012 which identified five technical issues that Autek had to resolve, together with passing the acceptance test procedures.

As to the accepted testheads 1-24, Modification P00012 stated that their acceptance had been "with the express understanding that the contractor shall implement a solution to any deficiencies (failure to meet the requirements of the contract) and shall retrofit all units previously accepted to assure that all units are functionally identical." On November 10, 1989, the Marine Corps issued another cure notice for failure to make progress in resolving testhead deficiencies and to complete the warranty repairs and corrections pursuant to the requirements of P00012. Autek responded to the notice on December 7, 1989, denying responsibility for the alleged lack of progress. The Marine Corps thereafter terminated the contract for default on January 24, 1990.

On July 30, 1990, Autek sued in the Court of Federal Claims seeking rescission of the termination for default or conversion to termination for convenience. The government counter-claimed for $6,484,038 which it had paid for the 33 delivered testhead units. The Court of Federal Claims rejected Autek's

claims and granted the government's counterclaim. Autek now appeals.

DISCUSSION

I.

On an appeal of a judgment from the Court of Federal Claims, we review questions of law de novo and findings of fact for clear error. Shelden v. United States, 7 F.3d 1022, 1026 (Fed. Cir. 1993).

Autek challenges the government's decision to terminate the contract for default. Autek contends that, because the supervisory contracting officer committed fraud during the course of contract performance, it should not be held liable for failure to meet the contract specifications. The Court of Federal Claims fully considered and properly rejected this argument. The Court of Federal Claims specifically found there was "no causal link" between Mr. Sherman's fraud and the contract changes and, even if there were such a link, it did not make Autek's performance impossible or impractical. Absent evidence that the illegal acts committed by Mr. Sherman affected Autek's ability to perform the contract, the Court of Federal Claims' decision on the fraud issue must be sustained. See Godley v. United States, 5 F.3d 1473, 1476 (Fed. Cir. 1993) ("Illegal acts by a Government, contracting agent do not alone taint a contract and invoke the void ab initio rule. Rather, the record must show some causal link between the illegality and the contract provisions.")

Autek also argues that it made sufficient progress and that the termination for default was an abuse of discretion. The Court of Federal Claims found the termination for default proper because Autek had failed to make progress in correcting or solving the specific technical issues set out in Modification P00012. In fact, the court referred to Autek's December response to the November cure notice as an anticipatory repudiation of the contract. Although we reject this characterization, \1 it is clear that the technical issues were not being solved by Autek. The Court of Federal Claims in its opinion analyzed each of the technical issues in detail, pointing out the evidence establishing the criticality of the several technical problems to an acceptable working testhead and the failures of Autek to provide solutions under its approaches. Finally, the December letter from Autek, while not an anticipatory repudiation of the contract, disclaims its responsibility for making the technical corrections. Under these circumstances, the Court of Federal Claims did not err in holding the termination for default to be proper.

\1 Anticipatory repudiation requires a "'distinct and unequivocal absolute refusal to perform."' United States v. Dekonty Corp., 922 F.2d 826, 828 (Fed. Cir. 1991) (quoting Dingley v. Oler, 117 U.S. 490, 503 (1886)). The response cited by the Court of Federal Claims never makes such a statement.

II.

A. Autek also objects to the amount of the counterclaim award. The Court of Federal Claims granted the government's counterclaim for $6,484,038, or $196,486 for each of the 33 testheads for which Autek had been paid. Autek challenges this amount because the award covers testheads that were "accepted" by the Marine Corps. The Court of Federal Claims recognized that between September 1987 and June 1989 the Marine Corps accepted testheads 1-24 by the execution of"unconditional Forms DD-250 ('Material Inspection and Receiving Report')," but explained that Autek subsequently executed contract Modification P00012 in September 1989 which made those acceptances conditional. Modification P00012 states that "[t]he government accepted units #1 through #24 with the express understanding that the contractor shall implement a solution to any deficiencies and shall retrofit all units previously accepted to assure that all units are functionally identical." In support of its holding, the court relied on FAR 52.246-2(k) which provides that "[a]cceptance shall be conclusive, except for latent defects, fraud, gross mistakes amounting to fraud, or as otherwise provided in the contract." (Emphasis added.) After determining that all of the testhead units were only conditionally accepted, the court required a full refund. See FAR 52.246-2(1) ("If acceptance is not conclusive . . . the Government . . . shall have the right to require the Contractor ... to repay such portion of the contract as is equitable under the circumstances....").

Autek argues that the statement in Modification P00012 does not retroactively change the unconditional acceptances previously made, but instead reflects only warranty obligations and a promise to retrofit previously accepted testheads if future testheads are changed.

Over nearly a two-year period the Marine Corps issued a series of DD Forms 250 for testheads 1-24 as they were delivered. On this form, the government may accept goods with or without reservation: "ACCEPTANCE of listed items has been made by me or under my supervision and they conform to contract, except as noted herein or on supporting documents." The Marine Corps accepted testheads 1-24 without any qualification. In contrast, for testheads 25-32, which were delivered after Modification P00012 became effective, the DD Forms 250 contained the express reservation: "CONDITIONAL ACCEPTANCE IAW CONTRACT MODIFICATION P00012." The Marine Corps made a clear distinction between conditionally accepted testheads and those previously accepted unconditionally. See Sperry Corp. v. United States, 845 F.2d 965, 969 (Fed. Cir. 1988) (explaining how the execution of a DD Form 250 ordinarily evidences final acceptance); see also Instruments for Industry. Inc. v. United States, 496 F.2d 1157, 1161 (2d Cir. 1974) (recognizing the finality of acceptance "absent an acceptance expressly and reasonably conditioned").

The Court of Federal Claims held, however, that those unqualified

acceptances could be and were retroactively made conditional by Modification P00012. In doing so, it relied on FAR 52.246-2(k) which provides an exception to unqualified acceptance where it is "otherwise provided in the contract." The clause containing this exception, however, was not included in the contract. The court nevertheless relied on it because FAR 46.302 made it a required clause of the contract. General Eng'g & Mach. Works v. O'Keefe, 991 F.2d 775, 779-80 (Fed. Cir. 1993), was also cited by the court for reading the clause into the contract.

Even if FAR 52.246-2 could be considered as part of Autek's contract, it is inapplicable to testheads 1-24. They were unconditionally accepted and at the time of such acceptance there was no provision in the contract that "otherwise provided." Modification P00012 was not entered into by the parties until later. Moreover, we do not view the language of Modification P00012 as attempting to change retroactively the prior acceptance of testheads 1-24. The critical technical problems which the Court of Federal Claims analyzed in detail, and which Autek was obligated to resolve, were set forth in section 2 of Modification P00012; however, these provisions were applicable to testheads 31-44, not to 1-24. See infra part II.B. Thus, to the extent Autek was required by Modification P00012 to correct deficiencies and retrofit "units [1-24] previously accepted to assure that all units are functionally identical," these requirements must be considered to be in the nature of warranty obligations to

correct deficiencies discovered later. (Emphasis added.)

With regard to testheads 1-24, therefore, the Marine Corps must show damages resulting from breach of warranty or breach of the deficiencies and retrofitting requirement covered by Modification P00012. We vacate the counterclaim award for these testheads and remand the warranty issue for further consideration.

B. Autek also argues that it satisfied the contract conditions for acceptance of testheads 25-33. Section 3 of Modification P00012 established the following requirements for payment for these testheads:

> The DD 250s for conditional acceptance of Units 25 and 30 will be executed upon presentation after execution of this modification. Conditional acceptance of these units will constitute authorization for payment in full of the unit price.
>
> The DD 250s for conditional acceptance of Units 26-29 will be executed upon presentation after execution of this modification. Conditional acceptance of these units will constitute authorization for payment of 85% of the unit price. The balance of the unit price is payable upon successful completion of the ATP at MCLB Albany the week of September 25, 1989.
>
> Units 31-44 will be conditionally accepted based on successful completion of the currently approved ATP at MCLB

> Albany. Conditional acceptance of these units will constitute authorization for payment of 85% of the unit price. The balance of the unit price is payable upon successful resolution of the issues identified in [section] 2 of this modification.

Because of this conditional acceptance language in section 3 and because of its determination that resolution of the issues identified in section 2 of the Modification was not accomplished, the Court of Federal Claims concluded that the Marine Corps never finally accepted testheads 25-33. Autek argues, however, that the parties stipulated that the Marine Corps paid the full contract price for testheads 25-32 and that this proves final acceptance by the Marine Corps.\2

For testheads 25 and 30, the first paragraph of section 3 provides only for conditional acceptance but inconsistently authorizes full payment of the unit prices. This inconsistent treatment is not elsewhere clarified in the modification. Further, the evidence does not explain why full payment was made for units that were only conditionally accepted, nor have we been directed to any evidence indicating that the Marine

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\2 In the case of testhead 33, the record indicates that the Marine Corps never made full payment and no other evidence was presented to show that this testhead satisfied the conditions of Modification P00012. Accordingly, we must affirm the Court of Federal Claims' judgment as to testhead 33.

Corps changed this qualified acceptance to a final acceptance. Under these circumstances, we must affirm the Court of Federal Claims' judgment as to testheads 25 and 30.

For testheads 26-29, the second paragraph of section 3 also provides for the acceptance to be conditional and for partial payment to be made on presentation of executed DD Form 250. That paragraph, however, expressly sets forth the further tests that had to be successfully completed for the balance of the unit prices to be paid. As stipulated, the full contract price for testheads 26-29 was paid. Moreover, Autek's evidence shows that there was a "successful completion of the A[cceptance] T[est] P[rocedures]" with respect to these testheads. A Marine Corps memorandum dated October 10, 1989 explicitly states that "units 26-29 passed the Acceptance Test Procedures" and "request[s] . . . payment of the remaining 15% of the unit price." We agree that this memorandum indicates that testheads 26-29 satisfied the requirements for full payment. Because all of the requirements set forth in Modification P00012 for final acceptance and full payment of the unit prices were satisfied, we must conclude that the Court of Federal Claims erred in holding that these units were not finally accepted. We also vacate the counterclaim award for these testheads and remand the warranty issue for further consideration.

For testheads 31 and 32, the third paragraph of section 3 again provides for conditional acceptance with similar yet more onerous requirements for payment.

The paragraph provides for conditional acceptance with an 85% initial payment "based on successful completion of the currently approved ATP" and a 15% retainage "payable upon successful resolution of the issues identified in paragraph 2 of this modification." Thus, the modification conditioned payment upon the satisfaction of two requirements, satisfaction of ATP for an 85% payment and satisfaction of paragraph 2 of the modification for payment of the 15% retainage. Although it was stipulated that the Marine Corps paid for these testheads in full, the Court of Federal Claims found that the conditions were never satisfied because the technical deficiencies set forth in section 2 were never resolved. Again, it is unclear why the Marine Corps would make full payment for defective testheads, but in view of the express conditions for final acceptance set forth in paragraph 2 which the court determined were not satisfied, we must affirm the judgment below as to testheads 31 and 32.

C. Finally, Autek argues that acceptance occurred for testhead 35 because the DD Form 250 for that testhead does not indicate that the acceptance was conditional. The Court of Federal Claims rejected this argument, noting that a January 19, 1990 letter from Autek to the Navy Deputy General Counsel "shows that Autek knew acceptance of unit 35 was conditional, even though the form for that testhead bore no such notation." Although the letter does not make specific reference to testhead 35, it states that "[m]odification 12 to the contract provides that any acceptance of

testheads by the Marine Corps is conditional." Moreover, as to testhead 35, Autek was required by Section 3 to resolve the technical issues identified in Section 2. As stated above, the Court of Federal Claims found that this did not occur. Accordingly, we will affirm the Court of Federal Claims' judgment as to testhead 35.

In summary, we affirm the Court of Federal Claims' determination that the termination for default was proper, and as for the counterclaim, we affirm-in-part as to testheads 25, 30-33, and 35 and vacate-in-part and remand as to testheads 1-24 and 26-29.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

95-5013

AUTEK SYSTEM CORPORATION,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

JUDGMENT

ON APPEAL from THE UNITED STATES COURT OF FEDERAL CLAIMS

in CASE NO(S). 90 - 710C

This CAUSE having been heard and considered it is

ORDERED and ADJUDGED:

AFFIRMED-IN-PART, VACATED-IN-PART AND REMANDED

ENTERED BY ORDER OF THE COURT

DATED MAR 22 1996

s/ Frances. X. Gindhart,
Clerk

Issued as a mandate: May 13, 1996

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

O R D E R

Before ARCHER, Chief Judge, RICH, Circuit Judge, and LOURIE, Circuit Judge.

A petition for rehearing having been filed by the APPELLEE,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on May 13, 1996 unless another time becomes appropriate under Rule 41.

FOR THE COURT,
FRANCIS X. GINDHART, CLERK

Dated: April 16, 1996

by s/ B. LeDuc
Brian P. LeDuc
Associate Chief Deputy Clerk

cc: DONALD C. HOLMES
SHALOM BRILLIANT

Filed
U.S. Court of Appeals for the FederalCircuit
APR 16 1996
FRANCIS X. GINDHART
CLERK

AUTEK SYSTEM V US, 95-5013
(CFC - 90-710C)

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* Note: Pursuant to Fed. Cir. R. 47.6, *
* this order is not citable as precedent*
* It is a public record. *
* ********** *

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

O R D E R

Before ARCHER, Chief Judge, RICH, Circuit Judge, and LOURIE, Circuit Judge.

A petition for rehearing having been filed by the APPELLANT,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on May 13, 1996 unless another time becomes appropriate under Rule 41.

FOR THE COURT,
FRANCIS X. GINDHART, CLERK

Dated: April 30, 1996

by s/ B. LeDuc
Brian P. LeDuc
Associate Chief Deputy Clerk

cc: DONALD C. HOLMES
SHALOM BRILLIANT

Filed
U.S. Court of Appeals for the FederalCircuit
APR 30 1996
FRANCIS X. GINDHART
CLERK

AUTEK SYSTEM V US, 95-5013
(CFC - 90-710C)

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* Note: Pursuant to Fed. Cir. R. 47.6, *
* this order is not citable as precedent*
* It is a public record. *
* ********** *